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88-1621

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

ROSARIO GAMBINO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Whether petitioner was deprived of his Sixth Amendment right to have the assistance of counsel for his defense because his trial attorney had an actual conflict of interest which adversely affected his performance arising from the discovery through Jencks Act disclosures that another client, a known drug dealer, was at the scene of the crime and the attorney neither disclosed this to the court or petitioner nor made any effort to determine whether, or prove that, the other client supplied the heroin for which petitioner was convicted.

2. Whether petitioner was deprived of his Sixth Amendment right to have the assistance of counsel for his defense because his trial attorney,

informed by the government that another client was at the scene of the crime, failed to make any effort to investigate, or prove the other client supplied the heroin for which petitioner was convicted when investigation would have readily revealed that prosecutors of his other client believed he was the supplier of the heroin for which petitioner was convicted and there was a reasonable probability that but for his attorney's unprofessional errors, the result of the trial would have been different.

3. Whether the failure of the United States to inform the Court of a defense attorney's conflict of interest and its efforts to coerce that attorney's later testimony by filing a confidential complaint with the disciplinary committee in New York about his affidavit

concerning his trial conduct, subpoenaing his tax returns and moving to prevent his future appearances in Federal Court in New Jersey shortly before the 2255 hearing, deprived petitioner of his Sixth Amendment right to counsel and his Fifth Amendment right to due process.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

ROSARIO GAMBINO,

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vs.

UNITED STATES OF AMERICA,

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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Petitioner, Rosario Gambino, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit, entered in this case on December 30, 1988. A petition for rehearing was denied by order entered on January 31, 1989.

OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit, Greenberg, C.J., affirming the district court's denial of petitioner's motion under 28 U.S.C. 2255, is reported at 864 F.2d 1064, and is reprinted in the appendix to this petition, App 1, together with the concurring opinion of Circuit Judge Sloviter, App 19 and the dissenting opinion of Circuit Judge Mansmann, App 24.

The opinion of the United States District Court for the District of New Jersey denying petitioner's 2255 motion, Bissell, D.J., was designated "not for publication" and has not been reported. It is reprinted in the appendix to this petition, App 46.

The opinion of the United States Court of Appeals for the Third Circuit on

petitioner's direct appeal, Higginbotham, C.J., is reported at 788 F.2d 938, and is reprinted in the appendix hereto, App 63-98.

JURISDICTION

The jurisdiction of this Court to review the judgment of the Third Circuit Court of Appeals is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment VI [1791]

> In all criminal prosecutions, the accused shall enjoy the right... to have the Assistance of Counsel for his defence.

Amendment V [1791]

> ...nor shall any person... be deprived of life, liberty, or property, without due process of law;...

28 U.S.C. 2255. Federal custody; remedies on motion attacking sentence.

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, ...or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.
>
> * * *
>
> An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.
>
> * * *

STATEMENT OF THE CASE

Petitioner, Rosario Gambino, was charged with four others in a multi-count drug indictment. Trial began on September 11, 1984. During the first week of trial the government turned over material required by the Jencks Act, 18 U.S.C. sec. 3500, to enable defendants' counsel to cross examine government witnesses with knowledge of their prior statements and reports. Among the materials turned over were government surveillance logs which revealed that a Gaetano Mazzara and two persons associated with him were seen at and around the Caffe Milano in Brooklyn on January 17, 1984 at the same time Rosario Gambino was charged with delivery of heroin there.

Mazzara and an associate, Castronovo, were seen in or around the Caffe Milano and

a suspect tile store nearby during critical times that afternoon while another Mazzara associate, Joseph La Rosa, was at Caffe Milano in the late evening hours for over an hour and a half. Ten minutes after La Rosa departed at 1:07 a.m., two codefendants of petitioner, Bosco and Spatola, left the Caffe Milano with the heroin.

When the Jencks materials were turned over, petitioner's attorney was representing Mr. Mazzara as he had been for the past six months. Mazzara was charged with being one of the leading figures in a major drug case in the Southern District of New York known as the Pizza Connection case. See, U.S. v. Badalamenti, et al, No. 84 Cr. 286. Mr. Mazzara had never before been mentioned, or referred to, in the proceeding against Rosario Gambino.

From the moment petitioner's attorney

saw the Jencks materials he knew he could prove from the government's own witnesses, that an alleged major heroin supplier, Mazzara, and two associates known to surveillance agents who named them six times in the surveillance sheets for that day and who were then charged in a major drug conspiracy case could be placed at the scene of the crime with which petitioner was charged. Not one of the 13 agents conducting surveillance that day or any other witness saw petitioner at the Caffe Milano. He also knew that he had in his personal possession discovery and other materials in the Mazzara case which might show Mazzara supplied the heroin for which petitioner was charged. In fact those materials contained statements by prosecutors charging that the heroin petitioner was on trial for supplying to Spatola was actually obtained "from another

supplier -- believed to be Castronovo and Mazzara..." A258.*

It was more than two weeks later, October 3, before the government rested and an additional 16 days before the trial concluded on October 19, 1984.

During all this time petitioner's attorney failed to inform him or the court, that his client Mazzara and two associates were present at the Caffe Milano at the time of the charged offense, or that he represented Mazzara in a pending major drug case.

Petitioner's attorney made absolutely no effort to investigate, discover, or call the facts to the attention of the jury. He did nothing. He made no discovery or Brady demand on the government for materials

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*References beginning with "A" are to the appendix filed in the Court of Appeals on the 2255 appeal.

concerning his client Mazzara's activities at Caffe Milano. To have done so would have exposed his conflict. He was attorney of record for both petitioner and Mazzara. When he cross-examined the surveillance agents, he never mentioned their observations of his client Mazzara. He never took a single step to determine what his client Mazzara was doing at Caffe Milano, what the government knew about his activity, or what his client Gambino knew about his client Mazzara.

He never examined extensive discovery materials in his possession at his office in the Mazzara case to see what they revealed about Mazzara's activities at Caffee Milano. And he never mentioned the name of his client Mazzara in the proceedings against his client Gambino.

He testified he had not even read the complaint against Mazzara which he received

months before the Gambino trial began and did not do so after seeing the Jencks material placing Mazzara at Caffe Milano to defend client Gambino. (A-49). When asked if he had seen a lengthy affidavit for a search warrant in the Mazzara case which placed Mazzara at the Caffe Milano, the type experienced criminal lawyers know well, he replied "Absolutely, positively, guaranteed...I never saw it." (A-59).

Petitioner's attorney admitted at the hearing that there was "substantial evidence" of client Mazzara's involvement in the transaction client Gambino was charged with and that one of the factors in his decision was he did not want to bring Mr. Mazzara's name out in the courtroom because he represented him. (A60).

In addition, without any discovery effort, investigation, discussion with his client Gambino, review of papers in his

possession, or so much as asking a surveillance agent who is this person Mazzara who was at the Caffe Milano and whether he was under investigation for drug dealing, petitioner's attorney, decided as a matter of trial strategy to do nothing according to his testimony at the evidentiary hearing. This was contrary to his affidavit filed with the sec. 2255 petition in which he said he carefully avoided implicating Mr. Mazzara out of a sense of loyalty to him and to avoid jeopardizing his position at his impending trial.

Had petitioner's attorney examined Mazzara documents in his possession and demanded others, as he was duty bound to do, he would have seen a government agent's statement that client Mazzara and his associate Castronovo were believed to have supplied the drugs his client

Gambino was charged with supplying and a government memorandum filed in opposition to a severance motion in the Mazzara case which stated "...Castronovo and Mazzara arranged for the delivery of heroin..." to Gambino codefendants Bosco and Spatola. (A-259). Such evidence in the face of a record absolutely silent on any relationship between Mazzara and Gambino would have been devastating to the prosecution.

Petitioner's attorney claimed he had absolutely no knowledge of the contents of materials in his possession and admits he made no effort to review them or obtain additional information.

The presence of Mazzara at the scene of the crime fit perfectly with the defense petitioner's attorney presented. In his opening statement, he said the evidence

would show the "heroin was obtained by others" (735a) and that Mr. Gambino was "not the person who was the source" (736a).* Mr. Gambino took the stand and denied being at Caffe Milano, testifying that if his car was seen there it was because he loaned it to Carlo Filiberto who testified he did indeed drive Mr. Gambino's car to Caffe Milano that day.

In his summation, petitioner's attorney repeatedly argued codefendants Bosco and Spatola were "merchants in the open market" who "were busy shopping around to see who they could buy their drugs from." (A593). He told the jury he would talk about who was not at Caffe Milano, not who was there. (A610) Thirteen agents with cameras did not see Mr. Gambino there. The codefendants were "...dealing

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*References ending in "a" are to the appendix on the direct appeal.

with somebody else..." not Mr. Gambino, (A617).

To have placed Mazzara at Caffe Milano would have provided a major defense. The government ridiculed the apparently made up names used by codefendants Bosco and Spatola as their supplier, countering petitioner's attorney's summation by arguing you didn't see them "there either that day." (5781a). There was no evidence they even existed. The government could not deny Mazzara and his associates existed and were present.

Petitioner's attorney speculated in explaining his strategy that the government might present evidence linking Mazzara and Gambino if Mazzara was pointed to as the supplier. But he never made any effort to find out what the facts were. He could have asked Mr. Gambino. He did not. There were no discovery materials in either case

or other mention linking Gambino and Mazzara in any way. The government built its case, as it repeatedly stated, on the proposition that Rosario Gambino supplied the drugs.

Petitioner was convicted and sentenced to forty five years in prison and fined $105,000.

On direct appeal, the Court of Appeals affirmed his conviction, declining to review his Sixth Amendment claim, United States v. Gambino, 788 F.2d 938, 953 (3rd Cir.), cert. denied on petition of other defendants, 479 U.S. 825 (1986), "without prejudice to his ability to initiate a Sec. 2255 collateral proceeding for the resolution of his conflict of interest claim." App 97.

Thereafter, petitioner sought relief under 28 U.S.C., sec. 2255. The trial judge having resigned from the bench, the

motion was assigned to a new judge. Petitioner sought to overturn his conviction based upon a denial of his Sixth Amendment right to the assistance of counsel because his trial attorney had an actual conflict of interest which adversely affected his performance. The Court held a one-day hearing and more than a year later, issued an opinion denying the 2255 motion. App 46.

The government took several actions against petitioner's attorney prior to the sec. 2255 hearing which were coercive and designed to influence his testimony at the hearing and undercut his affidavit filed with the petition. In his affidavit of June 9, 1986 counsel stated (A700):

> 6. Representing MR. MAZZARA, as I did at the time, it occurred to me that there was substantial evidence from which an argument

> could be made that he was the actual source of the heroin which was the subject of this Indictment. Nevertheless, when I cross-examined the surveilling agents, I carefully avoided any questions which might have implicated MR. MAZZARA, out of a sense of loyalty to him and for fear that I might jeopardize his position in his impending trial.
>
> 7. I did not call to the attention of ROSARIO GAMBINO the observations of MR. MAZZARA contained in the surveillance reports, nor did I discuss with him my belief that an argument could be made that MR. MAZZARA was, in fact, the source of the heroin.

The government filed a complaint against counsel with the disciplinary committee in New York which the Committee communicated to him before the sec. 2255 hearing. A69. The government advised counsel that because of his affidavit it would object to his appear-

ance pro hac vice in federal District Court in New Jersey. A71. It issued subpoenas for his income tax returns from 1979 to date and requested the record of funds he received from Gambino and Mazzara arguing later that it needed to show counsel's financial interest in the Gambino case was as great as in the Mazzara case. Counsel hired a lawyer who met with the government attorney in charge of Rosario Gambino's case and disclosed what counsel's position would be at the hearing. Following this meeting, the government withdrew its demand for counsel's tax returns.

At the 2255 hearing, counsel testified that one of the factors in his decision not to cross-examine the agents about Mazzara was that he " did not want to implicate Mazzara, [he] did not want to bring

Mazzara's name out in the courtroom because [he] represented him." (A50) However, the major thrust of counsel's testimony was that any argument that Mazzara, and not Gambino, was the source of the heroin would have been "specious," would have impacted unfavorably on Gambino and might have opened up the door to rebuttal evidence of which he was unaware, for example, possible surveillance evidence that might show Gambino with Mazzara. (A 83) Moreover, counsel testified, an argument that Mazzara, not Gambino, was the source of the heroin, would undermine the credibility of Spatola, whose later trial testimony exculpated Gambino and identified a Giuseppe Saia and "The Little Baron" as his sources. (A 88-101) Counsel also testified that he had considered the possibility that Gambino and Mazzara were both sources of the heroin. (A 136).

As in his affidavit, counsel acknowledged that there was "substantial evidence" from which the Mazzara argument could be made, but maintained at the hearing that the "substantial evidence" would not support a "substantial argument." (A 50, 68, 184) Counsel testified that he never called to Gambino's attention the observations of Mazzara near the Caffe Milano and did not tell Gambino that an argument could be made that Mazzara was the source of the heroin. (A 59) Nor did he notify the trial judge of his decision. (A 62)

When asked by the Court at the 2255 hearing about the government's failure to notify the trial judge of the dual representation the government said it was because "the government in this district", naming the two assistant U.S. Attorneys who handled the prosecution of petitioner in

New Jersey, did not know his counsel was also representing Mazzara in New York or "we would have." (A 235). But government attorneys in New Jersey did know. The attorney in charge of the Newark Strike Force, in an affidavit of March 20, 1985, filed in petitioner's case on the motion for a new trial, stated that he was familiar with Badalamenti, then pending in New York, having participated in the investigation and preparation of the case since March 1983. He stated that the affidavit for a search warrant which he prepared in April 1984 and the government memorandum in opposition to severance filed in July 1984 -- two documents in which the government implicated Mazzara as the source of heroin at the Caffe Milano on January 17, 1984 -- were provided to all defense counsel and that petitioner's counsel appeared as counsel for Mazzara at the

arraignment of the case on April 19, 1984. In addition, on October 2, 1984, petitioner's counsel appeared for Mazzara at an extradition hearing in New Jersey at which an assistant United States Attorney for the district also appeared.

A panel of the Court of Appeals, divided two to one, with three opinions, affirmed the District Court, 864 F.2d 1064 (1988) (App 1). A petition for rehearing and suggestion for rehearing en banc was denied with three of the ten Circuit Judges voting for rehearing by the Court in banc. (App 100)

REASONS FOR GRANTING THE WRIT

This case presents a classic conflict of interest. A lawyer in two separate cases learns that one of his clients has committed the very crime for which another client is on trial. The lawyer does nothing. He makes no disclosure to the Court or his client on trial. He makes no investigation. He makes no effort to use the information about the one client to create a reasonable doubt about the guilt of the other. His client is convicted.

All rights are in jeopardy when the right to independent and effective counsel fails because of the often essential protection it provides. No trial is likely to be fair to an accused whose counsel is burdened by a serious conflict of interest. The roles of

counsel and the courts are primary in detecting and avoiding conflicts because the ability of the client to recognize and understand the meaning of a conflict is often limited. Cf. Johnson v. Zerbst, 304 U.S. 458, 464-65 (1938); Mannhalt v. Reed, 847 F.2d 576, 580-81 (9th Cir.), cert. denied, 109 S.Ct. 260 (1988).

Courts have been reluctant to reverse convictions on the basis of ineffective assistance of counsel including those arising from alleged conflicts of interest where it is claimed that trial strategy explains the seemingly erroneous conduct of counsel because of the frequently subjective and second guess qualities of the review process. This has led to a dangerous erosion in the worth of the right to counsel. This case is an extreme example of the phenomena.

It is extreme because here the courts,

the prosecution and petitioner's own counsel combined to validate a defense strategy no one believed at the expense of his right to zealous counsel. Worse, all concluded counsel had no duty to even explore the benefit such stunning information as the presence of a major drug dealer at the scene of the crime might have to the defense. Any defense attorney without conflict would have leapt at the opportunity it offered. This inaction of petitioner's counsel was truly "astonishing" as Judge Mansmann said below, App 26, and Judge Becker did on oral argument of the direct appeal.

As Judge Mansmann of the Court of Appeals so powerfully demonstrated in her dissent, and as two members of the Court, Judges Higginbotham and Becker, evidently agreed in voting with Judge Mansmann for in banc review, there was the clearest and

most dangerous type of conflict of interest established in the record, a blow to the heart of the fact finding process.

Trial counsel, an experienced criminal defense attorney, had suddenly to choose between two masters, his client in this case, or a client in another case. The choice was important to the interests of both clients and to the self-interest of counsel. To petitioner it offered the opportunity to avoid a conviction and lengthy prison sentence by presenting evidence that a major drug supplier and two of his associates who were present at the time and place he was accused of supplying heroin were the actual suppliers. The evidence was eye witness testimony of federal agents surveilling the scene. No witness saw petitioner at Caffe Milano. If his own counsel had merely examined discovery documents in his possession, he

would have found government memos that in addition to placing Mazzara and his associates at Caffe Milano at the critical times, concluded Mazzara supplied the very heroin in question.

The Jencks materials presented trial counsel with the chance of a lifetime opportunity to save his client through evidence turned over by the government that another person committed the crime. Yet he did nothing. He never mentioned the name Mazzara to petitioner, to the court, or before the jury. He did not ask the government, or its surveillance agents on the witness stand, one question about the presence of Mazzara, Castronovo, or La Rosa. He froze.

Counsel chose to serve Mazzara and himself. Mazzara was spared the embarrassment and potential injury of having his own lawyer defending him in

one drug case implicating him in another and he would not have to change lawyers. Counsel saved both fees and had the conflict not been discovered, all embarrassment.

Counsel's predicament was clear. If he mentioned his dual representation to the Court, an inquiry would surely have led to his withdrawal from representation of Mazzara and perhaps petitioner, as well. If he asked the United States for Brady and discovery materials implicating Mazzara it would reveal his dual representation leading to the same result. If he examined materials in his possession in the Mazzara case he would violate his duty to Mazzara and if he discovered anything useful to petitioner, he would face the same dilemma if he sought to use it.

Possessed, at the very least, with irrefutable evidence from federal agents that a major supplier and two associates were repeatedly identified at the scene of a sale and delivery of heroin for which petitioner was indicted but never seen to be present, counsel could at the very least raise a reasonable doubt of petitioner's guilt in the jury's mind. Had he pursued the matter, as was his duty and as any unconflicted attorney would have done, whatever his trial strategy, he would have readily found evidence devastating to the prosecution in his own files.

Only when a lawyer for a codefendant of petitioner who had been acquitted presented him with evidence of a conflict, did counsel agree to sign an affidavit in support of a 2255 motion to set aside the conviction. Even then he testified he was too busy to prepare the affidavit himself.

In it he swore to the obvious, that he had substantial evidence that Mazzara was the source, that he carefully avoided any questions which might have implicated Mazzara out of a sense of loyalty to him to avoid jeopardizing his position and that he did not mention the Mazzara information or its potential use to petitioner.

The record shows the United States knew of counsel's dual representation at the time and failed to bring it to the Court's attention.

The United States engaged in a vigorous campaign to change counsel's testimony at the hearing. It filed a complaint with the grievance committee in New York, threatening his right to practice law. It subpoenaed his income tax records and discussed his testimony with him under that threat. The government's excuse was it needed to know how his fees from

petitioner compared to his fees from Mazzara, as if a lawyer's duty to his client depended on the size of the fee. It moved to disqualify him from future appearances in federal courts in New Jersey.

The government's conduct adds an important reason to review this case because it both subverted and trifled with Sixth Amendment rights of its accused. It presents the not pretty paradox of an insistence on removal of counsel from future cases and insistence on the propriety of his conduct where it violated constitutional rights.

At the hearing, counsel resorted to a facile trial strategy explanation of his conduct. He never renounced his affidavit. How could he? He admitted there was "substantial evidence" of Mazzara's involvement in the transaction with

which petitioner was charged and that he did not bring it out in part because he represented him. He then contended his failure to discuss Mazzara's presence at Caffe Milano with petitioner's had nothing to do with his loyalty to Mazzara. He testified a Mazzara defense for his client was "specious", irrelevant to his actual defense and would have impacted unfavorably on the defense. He decided this ignorant of the facts which he had ample time to review as a trial strategy. He contended he had not examined documents he possessed in the Mazzara case which suggested that Mazzara arranged the heroin delivery in question and conceded that he made no effort to determine the truth of the matter.

A new judge was assigned the 2255 petition. More than a year after the one

day 2255 hearing, he denied the relief sought. He gave little weight to counsel's affidavit, stating he believed it was coerced. He chose to believe counsel's explanation of his trial tactics and that counsel was not aware of the contents of the Mazzara documents suggesting Mazzara was the source. Placing himself at a trial he never attended, he speculated the Mazzara defense might be viewed as "grasping at straws". He did not find a duty on counsel to investigate what government witnesses offered and did not weigh the ethereal quality of the defense presented by the codefendant against the solid angularity of the Jencks materials.

Judge Greenberg, in the opinion announcing the judgment of the Court of Appeals wrote, counsel "...did not have a conflict of interest as it was completely consistent with his representation of both

clients not to launch blindly a Mazzara defense." App 12. He said nothing about counsel's blindly deciding to evade his duty to investigate a defense that could acquit his client thus trivializing the right to counsel.

Judge Greenberg said if a conflict existed it was extremely speculative since "...the evidence was equally consistent with an inference that Mazzara... was not its source, or was part of the same distribution chain..." as petitioner. App 12. Of course, the evidence was incomplete, but even evidence equally consistent with Mazzara being the source of the heroin would create a reasonable doubt that petitioner was the source. And there has never been any evidence presented in any discovery materials, or otherwise, that Mazzara and Gambino were part of the same distribution system. It is pure

speculation, never alleged, never charged and a cynical suggestion of major government withholding of evidence.

Judge Greenberg further found "...it must be concluded that from an objective viewpoint it was a matter of indifference to Mazzara if [his counsel] had advanced him, as the source of the heroin at [petitioner's] trial.", "...loyalty to Mazzara did not cause him to forego the Mazzara defense." "The defense was not raised because from [petitioner's] point of view it would have been foolish to do so... [Petitioner] should attribute his current predicament to his unlawful conduct, not to failings of his trial attorney." App 17-18.

It is totally unrealistic to suggest that it would be a matter of indifference to a client if his attorney in another trial advanced him as a source of heroin. The ability of the two persons to work

together with confidence would be destroyed. The attorney would be forced to withdraw from the representation in one case or both. The attorney's statements about the client might well be admissions binding upon the client and admissible against him. The action of his counsel might lead to his indictment on the charge, particularly if there was an acquittal of the other client in which the disclosures about him were significant.

Judge Sloviter concurred in the judgment of the Court of Appeals on the ground that the unanimous decision of the Court of Appeals on direct appeal restricted review by 2255 to whether additional evidence of conflict was presented at the hearing. She found the hearing produced precisely the same conduct she believed was deemed inadequate by the panel on direct appeal and in light of the

determinations concerning the credibility of counsel by the District Court she was "bound" by the decision. She observed "I may have had grave reservations had I been the District Judge." App 23. The Court of Appeals decision stands on the unsupportable view of one judge that it would be "foolish" to raise a defense from government evidence and that counsel had no duty to his client to even investigate the defense.

Judge Mansmann's dissent is a clear and unanswerable demonstration that on the uncontested facts in the record there was a conflict of interest adversely affecting counsel's performance. No contention as to trial strategy can overcome counsel's failure to investigate which under the circumstances must have been caused by a conflict of interest because any lawyer without conflict would have immediately done so.

Judge Mansmann's opinion is also a powerful demonstration of the importance of the Sixth Amendment issues raised in this petition. That her clarion call was heeded by only two judges shows the importance of a clear pronouncement by this Court if Sixth Amendment rights are to be protected in this difficult area.

There are no facts in the record and no theory of trial strategy that can save this conviction from the conflict of interest of petitioner's counsel. No heavily fact based finding below can justify counsel's failure to act to protect his client. See, Burger v. Kemp, 97 L.Ed.2d 638, 651 (1987). The findings of credibility of counsel's testimony at the hearing cannot justify his failure to investigate. Nor can any imaginable theory of defense do so unless lawyers are free to abandon pursuit of fact of innocence in

preference to theory of defense.

Petitioner's attorney was on notice, with ample time to investigate, that Mazzara and two associates were at the scene of the crime. He could not escape his duty to his client to determine the truth of the matter and what defense it might offer. He had in his possession documents he knew might and in fact did strongly suggest Mazzara was the supplier. He never even looked at them. How could he without feeling most painfully the impossible conflict he was in? What would happen to his representation of Mazzara if he raised the question?

Whatever a judge thinks, or fears, about the truth behind the record, courts can only deal with facts presented in adversarial proceedings. If lawyers fail to present facts because of a conflict of interest, truth and the client are the

victims. Facts from the Jencks submission of the United States revealed evidence that required defense counsel to investigate and act as well as to inform the court and his client of his conflict. He did nothing, to the clear detriment of petitioner, but testify against him when his conduct was challenged by the government. The prosecution which failed to raise the conflict with the court, but used it to bar counsel prospectively from the District, took advantage of counsel's predicament to support its conviction at the expense of the constitutional right to counsel.

It can never be good trial strategy to fail to investigate evidence that might prove someone else committed the crime with which a client is charged. The evidence available to counsel at trial from government witnesses could have readily been fitted in and greatly strengthened the

defense actually presented. Counsel failed to investigate or use the information because of the irreconcilable conflict of interest between his two clients to protect another client and his own self interest.

This Court has often observed that representation "... of conflicting interests is suspect because of what it tends to prevent the attorney from doing." Holloway v. Arkansas 435 U.S. 475, 489-90 (1978). See Wheat v. U.S., 108 S.Ct. 1692, 1697 (1988). Here the conflict of interest prevented counsel from investigating and presenting evidence provided by the United States which suggested Mazzara, not petitioner, supplied the heroin for which petitioner is sentenced to forty five years in prison.

CONCLUSION

The petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit should be granted.

Respectfully submitted,

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March 1989

APPENDIX

APP 1

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-5232

UNITED STATES OF AMERICA

v.

GAMBINO, ROSARIO,

Appellant

On Appeal from the United States
District Court for the
District of New Jersey
Crim. Action No. 84-00098-01 § 2255

Argued October 6, 1988

BEFORE: SLOVITER, MANSMANN,
GREENBERG, *Circuit Judges*

(Filed December 30, 1988)

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OPINION ANNOUNCING THE JUDGMENT OF THE COURT

GREENBERG, *Circuit Judge.*

Appellant, Rosario Gambino, appeals from an order entered in the United States District Court for the District of New Jersey by Judge Bissell following a plenary hearing denying his motion under 28 U.S.C. § 2255 to vacate his conviction entered on December 11, 1984 on various drug offenses and sentencing him to a total custodial term of 45 years and to pay a total fine of $105,000. The specific offenses and sentences were as follows:

> counts 11 and 12, possession of heroin with intent to distribute and distributing heroin on or about January 18, 1984, at Atlantic City, New Jersey (merged), 15 years followed by a special parole term of ten years and a $25,000 fine; counts 17 and 18, possession of heroin with intent to distribute and distributing heroin on or about February 20, 1984, at Somers Point, New Jersey (merged), 15 years followed by a special parole term of ten years and a $25,000 fine, the sentence to be consecutive to those imposed on counts 11 and 12; count 2, conspiracy to distribute heroin from at

least as early as October 1, 1983 until on or about March 16, 1984 at Atlantic City, New Jersey, 15 years and a fine of $25,000, the sentence to be consecutive to those imposed on counts 11, 12, 17 and 18; count 13, using a telephone at Cape May, New Jersey, on or about January 30, 1984 to facilitate the distribution of heroin, four years to be served concurrently with the other sentences and a $30,000 fine.

Appellant and co-defendants Erasmo Gambino, Antonio Gambino and Anthony Spatola, who were also convicted on various counts of the indictment, directly appealed from their convictions and, in addition, appellant appealed from an order denying him a new trial. We, however, affirmed. *United States v. Gambino*, 788 F.2d 938 (3d Cir.), *cert. denied*, 479 U.S. 825, 107 S.Ct. 98 (1986). Another defendant, Giovanni Bosco, was a fugitive at the time of the trial and thus was not tried with appellant. He was later apprehended and pleaded guilty to certain offenses charged in the indictment. The final defendant, Mario Gambino, was acquitted of all charges against him.

Inasmuch as the facts of the case were set forth in our earlier opinion they will not be repeated at length. *See* 788 F.2d at 940-41. It should be indicated, however, that evidence at the trial showed that appellant supplied the heroin mentioned in counts 11 and 12 of the indictment and sold on January 18, 1984 to undercover agents and that Spatola and Bosco obtained the heroin at the Caffe Milano in Brooklyn on the night of January 17-18, 1984. In his earlier appeal appellant asserted that his trial attorney, Jacob Evseroff, had simultaneously represented Gaetano Mazzara in a case referred to as the pizza connection case, *United States v. Badalamenti, et al.*, No. 84-Cr-286, a narcotics conspiracy case in the United States District Court for the Southern District of New

York. Appellant asserted that Mazzara was under suspicion as the source of the heroin sold to the undercover agents on January 18, 1984 by Spatola and Bosco. This dual representation was said to give rise to a conflict of interest on Evseroff's part since he failed to establish that Mazzara, and not appellant, was the source of the heroin. After an extensive discussion of appellant's claim, we indicated that circuit precedent required us to affirm his conviction without prejudice to his right to initiate a collateral proceeding under 28 U.S.C. § 2255 for the resolution of the conflict of interest question. 788 F.2d at 949-53.

Thus, appellant filed his motion in the district court claiming that his conviction was obtained in violation of his Sixth Amendment right to the effective assistance of counsel because of Evseroff's alleged conflict of interest which, in appellant's view, adversely affected his performance at appellant's trial. His motion was supported by an affidavit of Evseroff, dated June 9, 1986, which set forth that at the time of appellant's trial Evseroff was also representing Mazzara, who was charged with being a leader of a multi-million dollar heroin distribution organization, in the *Badalamenti* case. Evseroff indicated that during appellant's trial he obtained entries from surveillance logs for January 17, 1984 at the Caffe Milano that suggested Mazarra's involvement in the events of that day.[1]

Evseroff further stated that it occurred to him that there was substantial evidence from which an argument could be made that Mazzara was the actual source of the heroin. Nevertheless, according to his affidavit, when Evseroff cross-examined the surveillance agents, he carefully avoided any questions

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1. These logs were obtained by Evseroff pursuant to 18 U.S.C. § 3500.

which might have implicated Mazzara, out of a sense of loyalty to him and for fear that he might jeopardize Mazzara's position in his impending trial. Evseroff also stated that he did not call appellant's attention to the fact that an argument could be made that Mazzara was the source of the heroin. The affidavit gave no indication of who its author was or how it came to be executed.

A plenary hearing was held on the motion on October 31, 1986. On direct examination by appellant's attorney, Evseroff testified that he had met Mazzara in April 1984 and represented him in the *Badalamenti* case. Evseroff testified that during appellant's trial he was supplied with government surveillance reports showing that Mazzara was seen around the Caffe Milano on January 17, 1984.

Surveillance log J-146 was then admitted into evidence. It indicates that Spatola arrived in the area of the Caffe Milano at 2:27 p.m. and entered at 2:30 p.m. At 2:40 a yellow Mercedes Benz departed from in front of the cafe, a significant fact as the vehicle was identified as being appellant's. At 2:47 p.m. Spatola exited the cafe and entered the nearby 18 Avenue Tile Co. with two unidentified men. Mazzara and Francesco Castronovo arrived at the scene at 2:58 p.m. and entered the Caffe Milano at 3:00. At 3:09 p.m. they were observed on the street and then entering the 18th Street Tile Co. At 3:41 p.m. Mazzara and Francesco Castronovo left the tile store and departed the scene. Nothing in the log indicated that Mazzara was seen delivering heroin.[2]

Evseroff testified that the government argued at appellant's trial that appellant supplied the heroin to Spatola and Bosco which they sold to the undercover

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2. It appears that the surveillance was not constant as the agents did not want to arouse suspicions regarding their activities.

agents. But Evseroff said that even though he had examined the above described log prior to cross-examining the surveillance agents, he did not cross-examine them about Mazzara or seek additional information about his involvement in the episode because it would have been a "specious argument" to contend that Mazzara, and not appellant, was the source of the heroin and he did not want to bring out Mazzara's name. Evseroff said that while there was substantial evidence which could have been articulated to make an argument that Mazzara was the source of the heroin it would not have been a "substantial argument." He also said it would have been unfair to draw an inference that Mazzara was involved in the matter.

Evseroff also testified that he did not bring appellant's attention to the surveillance observations of Mazzara and did not tell appellant that an argument could be made that Mazzara was the source for the heroin. Further, he did not bring the matter to the attention of the trial judge as he perceived no conflict of interest requiring him to do so.

Evseroff explained how he came to execute the affidavit. After appellant's original appeal had been argued, another attorney, Charles Carnesi, who had represented the acquitted Mario Gambino at appellant's trial, asked Evseroff to sign an affidavit concerning the circumstances under which he made his decision not to examine the agents about Mazzara. Evseroff was willing to do this and, after appellant's convictions were affirmed, agreed to supply the affidavit. But he was busy on other matters so he therefore asked Carnesi to prepare the affidavit and submit it to him. Carnesi did so but Evseroff would not sign it in its original form as he objected to a statement in it that Mazzara was the source of the heroin. Consequently, the affidavit was redrafted and Evseroff

then signed it. He said that the language in the affidavit was Carnesi's.

Evseroff testified that in October, 1986, a few weeks before the hearing on appellant's motion, he received from the Grievance Committee of the Appellate Division, Second Department of the Supreme Court of New York, an inquiry about a claim, predicated on his affidavit of June 9, 1986, that he had a conflict of interest in appellant's case. The government acknowledges that it brought the matter to the committee's attention. While Evseroff was concerned about the complaint it did not cause him to rethink the matter. He further testified that, because of his affidavit, the government had advised him it would object to his appearance *pro hac vice* in the District of New Jersey in another case. He also said that two weeks prior to the hearing, an FBI agent had served a subpoena on him for his income tax returns from 1979 to that time and that he had been asked to produce records of funds received from appellant and Mazzara. Evseroff engaged a lawyer to represent him and, after a meeting between his lawyer and the government attorney in charge of this case, at which the lawyer disclosed what Evseroff's position would be at the hearing, the demand for the tax returns was withdrawn.

On cross-examination by an assistant United States attorney, Evseroff explained what he meant by substantial evidence to argue that Mazzara was the source of the heroin. He indicated that the only information on the point he had at the trial was that Mazzara had been in the area on January 17, 1984 and had been arrested in an unrelated drug case. Evseroff felt that this would have been an insufficient basis upon which to pursue a line of questioning to establish Mazzara's involvement. He said appellant had "a good, viable, solid defense" with respect to the events of

January 17, 1984, as appellant was never in Brooklyn on that day and his car, which was identified as being in the area of the Caffe Milano, was being used by someone else. Evseroff considered that the Mazzara defense was a specious argument irrelevant to his actual defense and would have impacted unfavorably upon appellant, a conclusion he based on his substantial experience as a trial lawyer. He was also concerned that the government might be able to link appellant and Mazzara in which event it would have been counterproductive to have brought up the Mazzara defense.

He further indicated that it was part of his defense strategy to establish that on January 17 there were 13 surveillance agents in Brooklyn but none saw appellant and that he, in fact, carefully brought this out on cross-examination. He further developed at trial that only one agent saw appellant's car in the area on January 17. He also planned to call Carlo Filiberto, appellant's neighbor, to testify that he used appellant's car in Brooklyn on January 17 and that appellant was home in Cherry Hill, New Jersey, that day. Filiberto in fact so testified. Evseroff also knew that appellant would testify, deny guilt, and confirm that he had lent his car to Filberto.

Evseroff said that Spatola testified at the trial and gave testimony exculpatory as to appellant. In fact, Spatola testified at the trial that he obtained the heroin in Brooklyn on January 17 from Giovanni Saia and not from appellant. Evseroff said that when he cross-examined Spatola he did not try to discredit his statement that he obtained the heroin from Saia. He also said that Spatola's lawyer told him in advance that if Spatola testified he would exonerate his client. Evseroff further indicated that Spatola testified that appellant had nothing to do with the heroin sold on February 20, 1984. At the trial Spatola said that that heroin came from the "Little Baron."

Evseroff, however, was not completely clear as to when he knew Spatola would testify but he was certain that it was during the government's case, quite a while before the defense started and he thought it was before he cross-examined the surveillance agents. Thus, Evseroff considered that he would be impeaching the anticipated Spatola testimony if he attempted to show that Mazzara supplied the heroin and he did not want to do this as Spatola was his best witness. He also reiterated that while he did not discuss Mazzara's presence at the Caffe Milano with Gambino, that omission had nothing to do with loyalty to Mazzara. He further testified that he was aware that at trial he was not confronted with an either/or situation between appellant and Mazzara as the heroin source so that naming Mazzara would not necessarily exonerate appellant.

Carnesi also testified at the hearing. He said that he and Evseroff have offices in the same building in Brooklyn and are colleagues and friends. He represented Mario Gambino who was a defendant at appellant's trial and was acquitted on all charges. About two months after the trial he was contacted by a defendant in the *Badalamenti* case regarding representation. To determine whether he would get into that case he examined certain documents from the case in which there were references to the events of January 17, 1984, which indicated it was the government's position that Mazzara and Castronovo had supplied the heroin for the January 18 sale. He brought this information to Evseroff's attention and he then cooperated with the attorney, Pamela Higgins, who prosecuted appellant's original appeal. He attributed his involvement on behalf of appellant to the facts that he was familiar with both appellant's case and the *Badalamenti* matter and that Evseroff was continuously on trial and less available to help on the appeal.

Carnesi testified that after the argument before this court on appellant's original appeal, Herald Fahringer, who along with Higgins was representing appellant, got in touch with him about obtaining an affidavit from Evseroff. Carnesi discussed the matter with Evseroff but no affidavit was executed until after appellant's convictions were affirmed. Evseroff asked him to draft the affidavit, and he did so, but then Evseroff objected to a portion indicating that the government had evidence that Mazzara or Castronovo was the source of the heroin. Thus, he changed the affidavit to say only that there was substantial evidence that Mazzara was the source of the heroin. According to Carnesi, Evseroff never contended that it would be a specious argument to raise the Mazzara defense. Evseroff signed the changed affidavit.

After Evseroff received the grievance inquiry he began to refer to his eschewing cross-examination of the surveillance agents on the Mazzara defense as a tactical decision. It also appeared from Carnesi's testimony that Evseroff had not seen the documents which Carnesi obtained in the *Badalamenti* case until after appellant's trial. The documents which Carnesi examined suggested that Castronovo and Mazzara arranged for the delivery of the heroin on January 17 at the Caffe Milano to a "Gambino representative."

Judge Bissell decided appellant's 28 U.S.C. § 2255 motion in an unpublished decision dated March 10, 1988. He reviewed the law regarding conflicts of interest and the Sixth Amendment right to counsel and stated that when there is an actual conflict proven, prejudice to the defendant is presumed, though this presumption does not relieve a defendant of the burden of proving the existence of an actual conflict adversely affecting his attorney's performance. He found that there was no conflict and appellant was not deprived of effective assistance of counsel. The judge gave little

weight to Evseroff's affidavit as he thought that its execution had been coerced. He pointed out that he observed Evseroff testify and he believed the testimony which explained Evseroff's trial tactics. The judge found that Evseroff was not aware of the *Badalamenti* papers which Carnesi read after appellant's trial suggesting Mazzara as the source of the heroin. Thus, Evseroff had very little actual knowledge linking Mazzara to the actual sale or delivery to Spatola. Judge Bissell accepted Evseroff's testimony that the Mazzara defense would have been specious because of the paucity of evidence available to Evseroff connecting Mazzara to the heroin, and would thereby imperil the credibility of appellant's defense.

The judge also said that inasmuch as "Evseroff had no idea as to what evidence the government might have linking Mazzara" with appellant it would have been foolish to launch a "Mazzara defense" only to be confronted with rebuttal evidence linking them and providing an argument that both were involved in the heroin delivery. Moreover, the judge said that "although he was not absolutely certain, Evseroff's best recollection was" that he knew prior to reviewing the surveillance log that Spatola would name someone other than appellant as his source for the heroin and, therefore, Spatola's credibility would be imperiled if Evseroff cross-examined the government agents about Mazzara's presence and the possibility of his involvement. Inasmuch as the success of appellant's defense depended in large measure on Spatola's credibility, the judge found that it was a reasonable exercise of professional judgment by Evseroff not to push the Mazzara defense and jeopardize his real position.

Judge Bissell also found that Evseroff ably developed appellant's defense that he was not involved through witnesses such as Carlo Filberto, who testified

at trial that he had borrowed appellant's yellow Mercedes Benz on January 17 and had driven to Brooklyn. This vehicle was, of course, identified as being at the Caffe Milano. The credibility of this defense could have been compromised by a "Mazzara defense" which might be viewed as "grasping at straws." Evseroff did not have a conflict of interest as it was completely consistent with his representation of both clients not to launch blindly a Mazzara defense. Even if a possible conflict existed, it was extremely speculative since even at the time of the 28 U.S.C. § 2255 hearing, the evidence was equally consistent with an inference that Mazzara, who had departed the area eight hours before the heroin was received by Spatola and Bosco, was not its source or was part of the same distribution chain as appellant. In view of these findings, Judge Bissell denied appellant's motion and this appeal followed.

In a discussion of the merits of the appeal the well-established governing law should be set forth. The Sixth Amendment guarantee of effective assistance of counsel includes two correlative rights, the right to adequate representation by an attorney of reasonable competence and the right to the attorney's undivided loyalty free of conflict of interest. *Government of Virgin Islands v. Zepp*, 748 F.2d 125, 131 (3d Cir. 1984). To establish constitutionally inadequate representation a defendant must prove that the attorney's performance was unreasonable under prevailing professional standards and that this performance prejudiced the defense, *i.e.*, "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 2068 (1984); *see also Diggs v. Owens*, 833 F.2d 439, 444-45 (3d Cir. 1987), *cert. denied*, ___ U.S. ___, 108 S.Ct. 1277 (1988).

In this proceeding, however, appellant does not claim that Evseroff's representation was inadequate. Rather, he asserts that Evseroff had a conflict of interest because of his representation of Mazzara in view of the evidence pointing to Mazzara as the source of the drugs. In that circumstance appellant need only establish that there was multiple representation, the existence of which the government does not dispute and which thus need not be further discussed, and that there was an actual conflict of interest which adversely affected Evseroff's performance. *Burger v. Kemp*, ___ U.S. ___, ___, 107 S.Ct. 3114, 3120 (1987). *Cuyler v. Sullivan*, 446 U.S. 335, 348, 100 S.Ct. 1708, 1718 (1980); *Sullivan v. Cuyler*, 723 F.2d 1077, 1086 (3d Cir. 1983). If appellant is able to make these showings he is not obliged to demonstrate prejudice as it will be presumed. *Strickland v. Washington*, 446 U.S. at 692, 104 S.Ct. at 2067; *Cuyler v. Sullivan*, 446 U.S. at 349-50, 100 S.Ct. at 1719; *United States v. Gambino*, 788 F.2d at 950-51; *United States v. Costanzo*, 740 F.2d 251, 259 (3d Cir. 1984), *cert. denied*, 472 U.S. 1017, 105 S.Ct. 3477 (1985). However, it "is important to note that overemphasis on the presumption of prejudice cannot operate to obviate the requisite obligation to demonstrate the existence of an actual conflict." *United States v. Gambino*, 788 F.2d at 951.

An actual conflict of interest "is evidenced if, during the course of the representation, the defendants' interests diverge with respect to a material factual or legal issue or to a course of action." *Sullivan v. Cuyler*, 723 F.2d at 1086. To reach the level of constitutional ineffectiveness the conflict "must cause some lapse in representation contrary to the defendant's interests but such lapse need not rise to the level of actual prejudice." *Ibid.* A lapse in representation adversely affecting the defendant's

interests can be demonstrated not only by what the attorney does, but by what he refrains from doing. *Holloway v. Arkansas*, 435 U.S. 475, 489-90, 98 S.Ct. 1173, 1181-82 (1978).

It seems clear that the existence of an actual conflict and adverse effects from it are more likely to be evident in cases in which an attorney takes positive steps on behalf of one client prejudicial to another than in cases in which the attorney's actions are based on inaction and are passive, as is charged here. Thus, if an attorney jointly represents in one trial two defendants claiming innocence, his conflict in arguing that one should be acquitted because the other is guilty is obvious. On the other hand, an attorney presenting a stronger defense for one client than another might well be free of conflict. Overall, conflicts problems are more likely to arise in cases involving joint representation in a single proceeding rather than multiple representation in which the attorney represents different clients in different matters, the situation here. *See United States v. Fahey*, 769 F.2d 829, 834 (1st Cir. 1985).

Here, the alleged Sixth Amendment violation is that Evseroff did not advance the Mazzara defense because to do so would have been adverse to Mazzara. The United States Court of Appeals for the First Circuit in *United States v. Fahey*, 769 F.2d at 836, in which the alleged conflict was based on what an attorney did not do, indicated that:

> In order to establish an actual conflict the petitioner must show two elements. First, he must demonstrate that some plausible alternative defense strategy or tactic might have been pursued. He need not show that the defense would necessarily have been successful if it had been used, but that it possessed sufficient substance to be a viable alternative. Second, he must establish

> that the alternative defense was inherently in conflict with or not undertaken due to the attorney's other loyalties or interests.

Clearly, a defendant who establishes that his attorney rejected a plausible defense because it conflicted with the interests of another client establishes not only an actual conflict but the adverse effects of it. Consequently, the test set forth in *United States v. Fahey* includes both the actual conflict and adverse effects prongs of the conflict of interest analysis. On the other hand, there is no conflict of interest adversely affecting the attorney's performance if an attorney at trial does not raise a defense on behalf of his client because to do so is not in that client's interest even though it is also in the interest of another client that it not be raised. To the contrary, that is a coincidence of interests.

The record must be considered in the light of the foregoing principles.[3] It is clear that the multiple

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3. The parties are in dispute over the standard of review, appellant asserting it is plenary and the government claiming we Judge Bissell's findings must be accepted unless they are clearly erroneous. In *Government of Virgin Islands v. Zepp*, 748 F.2d 125 (3d Cir. 1984), the court said that whether the representation of a defendant at trial was constitutionally inadequate is a mixed question of law and fact and thus the clearly erroneous rule is inapplicable and the district court's conclusion is freely reviewed. *Id.* at 134. Thus, a plenary determination of whether there was an actual conflict of interest adversely affecting Evseroff's performance must be made. However, to the extent that the legal conclusions reached on this appeal are dependant upon the findings by the district judge of basic, primary, or historical facts in the sense of a recital of external events and the credibility of the witnesses, his findings should be accepted unless clearly erroneous. *See Anderson v. Bessemer City*, 470 U.S. 564, 573-74, 105 S.Ct. 1504, 1511-12 (1985); *LoConte v. Dugger*, 847 F.2d 745, 750 (11th Cir. 1988); *United States v. Allen*, 831 F.2d 1487, 1494 (9th Cir. 1987), *cert. denied*, 108 S.Ct. 2907 (1988); *United States v. McConney*, 728 F.2d 1195, 1200 (9th Cir.), *cert. denied*, 469 U.S. 824, 105

representation did not give rise to an actual conflict of interest in the sense that anything which Evseroff could have done at the trial on behalf of appellant but omitted to do could have prejudiced Mazzara. Mazzara, of course, was not a defendant at the trial nor was he even named in the indictment against appellant and his co-defendants. Thus, he could not have been directly affected by the outcome of the case. Further, while Mazzara presumably would have preferred not to see his name advanced as a possible source of the heroin, appellant has not demonstrated how Mazzara would have been injured or prejudiced if this had happened. It is important to remember that the evidence available to Evseroff regarding Mazzara which he did not bring out at trial was already in the government's files. Thus, Evseroff's failure at worst is that he should have cross-examined the surveillance agents regarding their observations of Mazzara and otherwise used evidence in the government's possession regarding Mazzara to establish Mazzara as the source of the drugs sold January 18, 1984. Mazzara would not have been prejudiced if Evseroff had done this and thus it follows that appellant and Mazzara did not have conflicting interests in Evseroff's performance at appellant's trial.[4]

It is also important to remember that there is nothing in the record to support a contention that Evseroff had information not known to the government linking Mazzara to the heroin. Indeed, appellant does not allege that he did. Thus, Evseroff did not suppress

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S.Ct. 101 (1984). It must be added, however, that even if the review was entirely plenary the result based on the record on this appeal would not be different than that reached.

4. This appeal does not deal with an ethics complaint. It is possible that conduct not violating a defendant's Sixth Amendment rights might nevertheless expose an attorney to discipline.

evidence useful to appellant in order to avoid inculpating Mazzara. Accordingly, it must be concluded that from an objective viewpoint it was a matter of indifference to Mazzara if Evseroff had advanced him as the source of the heroin at appellant's trial.

It must be realized, however, that an attorney, though not having an objective conflict of interest, might for other reasons be reluctant to make a contention reflecting adversely on a client. Thus, as recognized by the Court of Appeals in *United States v. Fahey*, an attorney might not advance an alternative defense because of his other loyalties or interests. 769 F.2d at 836. Here, however, after listening to Evseroff's testimony and observing his demeanor at the hearing, Judge Bissell concluded that Evseroff did not raise the Mazzara defense because he concluded that it was specious and could have imperiled the credibility of appellant's entire defense. While it is true that there was some reason beyond the logs, in the form of the *Badalamenti* materials, to link Mazzara to the January 18 heroin transaction, Evseroff was not aware of the materials at the trial and thus it cannot be concluded that his failure to use them was because of loyalty to Mazzara. Further, Evseroff knew, probably before he cross-examined the surveillance agents, that Spatola would testify that Saia was the source of the heroin delivered at the Caffe Milano, and that any attempt to establish that Mazzara had supplied that heroin would undermine Spatola's testimony. Thus, Evseroff's loyalty to Mazzara did not cause him to forego the Mazzara defense. The defense was not raised because from appellant's point of view it would have been foolish to do so. Therefore, Evseroff had no conflict of interest at appellant's trial.[5] *See Burger v.*

5. Judge Bissell's findings regarding Evseroff's trial strategy must be accepted as they are not clearly erroneous. Nevertheless, the same conclusion would be reached on a plenary review.

Kemp, ___ U.S. at ___, 107 S.Ct. at 3120-21. While appellant now otherwise contends and is free with his criticism of Evseroff, a conflict of interest cannot be invented on his behalf simply so he can be given a new trial. Appellant should attribute his current predicament to his unlawful conduct, not to failings of his trial attorney.

As previously explained, for appellant to be granted relief he must show that, in addition to Evseroff having a conflict of interest, the conflict adversely affected his performance. For the reasons set forth as to why the Mazzara defense was not raised it is clear that even if Evseroff had a conflict of interest at the trial, which he did not, the conflict did not adversely affect his performance. It is evident from Evseroff's reasoning as to why he did not raise the Mazzara defense, that he would have not have advanced it even if Mazzara had never been his client.[6] *See Burger v. Kemp*, ___ U.S. at ___, 107 S.Ct. at 3121. Thus it cannot reasonably be concluded that the fact that Mazzara was his client in any way affected his trial performance.

The result reached herein is not undermined by the government's conduct, of which Gambino makes much, with respect to the grievance committee, the *pro hac vice* application and the tax returns. The government's actions are significant to this appeal only insofar as they impacted on Evseroff's credibility at the hearing. But Judge Bissell believed Evseroff's testimony and there is no reason why he was wrong in this as it was quite logical. It must be further pointed

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6. While it must be concluded that appellant is not entitled to relief as Evseroff had no conflict of interest adversely affecting his performance and there was thus no Sixth Amendment violation, it should also be pointed out that in any event there is no basis on which he could be granted relief for the convictions on counts 17, 18 and 2. On the record, there is no suggestion that the heroin involved in the hypothetical Mazzara delivery was related to those counts.

out that in view of the content of Evseroff's affidavit it was certainly appropriate for the government to bring the matter to the grievance committee's attention and to object to his admission *pro hac vice* in New Jersey. While the subpoena for his tax returns is more questionable, the government quite plausibly points out that it was interested in showing from the returns and from Evseroff's income records that Gambino, as a client, was financially more significant to Evseroff than Mazzara, thereby impeaching the content of the affidavit. Thus, when Evseroff supplied the information regarding the fees from them the subpoena was withdrawn.

Finally, while there was no direct evidence that Evseroff had been coerced when he signed the affidavit, Judge Bissell was not required to overlook the fact that Evseroff had defended a person involved in serious organized criminal matters and had not succeeded in obtaining his acquittal. Surely Judge Bissell could draw an inference that in such circumstances Evseroff might think it prudent to take steps to assist his client in obtaining a new trial, even if Evseroff thereby raised an ethical problem for himself.

In view of the aforesaid, the order of March 10, 1988 denying appellant relief will be affirmed.

SLOVITER, *Circuit Judge*, concurring.

While I agree with the conclusion that Judge Greenberg reaches in affirming the district court's denial of Gambino's motion pursuant to 28 U.S.C. § 2255, I reach that result by a somewhat different analytic route. I do not believe this is an appropriate case in which to divorce the inquiry regarding the presence of an actual conflict of interest from that of its

adverse effect. In light of the procedural history of this case, I view the issue before us as only whether counsel for Rosario Gambino, Jacob Evseroff, was laboring under an actual conflict of interest which adversely affected his performance during the trial of Gambino.

We must examine the record before us in light of the Supreme Court's holding in *Cuyler v. Sullivan*, 446 U.S. 335 (1980), that a mere potential conflict of interest is insufficient to taint a criminal conviction. Instead, the Court held, in order to establish a Sixth Amendment violation, defendant must demonstrate that "an actual conflict of interest adversely affected his lawyer's performance." *Id.* at 348.

The first time this issue was before this court was on the direct appeal from the conviction. *See United States v. Gambino*, 788 F.2d 938 (3d Cir. 1986). At that time, Gambino argued that Evseroff's representation of him in this case while simultaneously representing Mazzara in the *Badalamenti* case in New York created an actual conflict of interest. Gambino argued that the actual conflict of interest was established by Evseroff's omissions in (1) failing to question government agents about Mazzara's involvement in the January 18 drug transaction, (2) failing to investigate and obtain additional witnesses to implicate Mazzara and exonerate Gambino, (3) failing to vigorously suggest to the jury during summation that Mazzara was a supplier of heroin, and (4) failing to alert the trial judge of his dual representation either before trial or during trial when the conflict became apparent. *Id.* at 953.

This court concluded that "it is far from manifest that an actual conflict existed." *Id.* We stated that "[w]hile the evidence strongly indicates that there *may* have been a conflict, 'a possible conflict inheres in almost every instance of multiple representation.'" *Id.* at 953 (emphasis in original). We stated that inasmuch

as "both parties have advanced various, plausible interpretation of the trial strategy" of Evseroff, we would affirm the conviction without prejudice to Gambino's ability to initiate a section 2255 collateral proceeding for the resolution of his conflict of interest claim. *Id.*

Because we distinguished Gambino's situation from the "exceptional situation" where it was apparent that "trial counsel labored under an actual conflict of interest," *id.*, I view our earlier holding as conclusively deciding that if Gambino produced nothing more than proof of the four omissions referred to above, we would not find an actual conflict of interest. An examination of the evidence produced at the section 2255 proceeding shows that Gambino did not produce persuasive evidence that Evseroff's trial conduct was tainted by the multiple representation. Thus, I respectfully disagree with Judge Mansmann's conclusion "that we are unrestricted by our prior decision."

In essence, Judge Mansmann relies for her conclusion that there was an actual conflict of interest which adversely affected Evseroff's performance on precisely the same conduct by Evseroff that Gambino referred to in his direct appeal when he argued that his Sixth Amendment right was violated. Were these omissions enough to fatally infect the trial, the first panel would have so held. Because nothing new and material was developed at the section 2255 hearing, we must give some effect to the first panel's decision, and thus I cannot agree with Judge Mansmann that we are "unrestricted."

In this case, the district court was instructed to determine whether Gambino's interpretation of trial counsel's performance or the government's contrary interpretation was more plausible, should the case return to it on a section 2255 motion. The district

court, after hearing the evidence presented at the hearing, found that Evseroff "presented a credible picture of an experienced trial lawyer making legitimate, reasonable choices regarding a course of cross-examination and the pursuit of one or more defenses . . . ." App. at 692. The court further found that "it was completely consistent with Evseroff's representation of both clients [Mazzara and Gambino] that he not launch blindly a 'Mazzara defense' in the Gambino litigation. The interests of [Gambino] were best served by this decision and the defense developed for him was a good one, had the witnesses supporting it been believed." App. at 697.

Of course, had the district court credited Evseroff's affidavit in which he stated that he avoided asking the FBI agents questions which could implicate Mazzara because he did not want to jeopardize Mazzara's impending trial, this case would be governed by our decision in *Sullivan v. Cuyler*, 723 F.2d 1077, 1086-87 (3d Cir. 1983). There we held that the testimony by one of the attorneys who had represented co-defendants that he would have employed a different strategy if he had only represented defendant Sullivan was enough to show an actual conflict of interest. Here, however, the district court gave no credence to Evseroff's affidavit because it found that the affidavit was procured under circumstances which suggested "the presence of underlying forces and pressures." App. at 691. Instead, the district court credited Evseroff's testimony at the hearing that his conduct at trial was motivated by trial strategy rather than by an effort to protect his other client, Mazzara.

It is apparent from the Supreme Court's most recent discussion of this issue following *Cuyler v. Sullivan* that an appellate court must defer to such findings by the district court. In *Burger v. Kemp*, 107 S. Ct. 3114 (1987), the Court upheld the district

court's conclusion that the overlap of counsel whose office represented two defendants implicated in the same crime did not so infect the representation as to constitute an active representation of competing interests. The Court stated that the district judge "is in a far better position than we are to evaluate a charge of this kind," and referred to the role of the court of appeals as conducting "appellate review of these heavily fact-based rulings." *Id.* at 3121.[1]

While I may have had grave reservations had I been the district judge about what could be viewed from the cold record as a possible attempt by the government to influence Evseroff's testimony at the hearing by complaining to a bar disciplinary committee about his conduct as reflected in the affidavit and subpoenaing his tax records, I am not free to make such a credibility determination. Since I am bound by the one made by the district court, I believe it follows that we are also bound to accept its conclusion that there was no actual conflict of interest which adversely affected Evseroff's representation of Gambino at his trial. For this reason, I also vote to affirm.

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1. Moreover, although Judge Mansmann states that the evidence of an actual conflict was not as strong here as in Burger v. Kemp, in *Burger* the majority of the Supreme Court rejected the conflict of interest claim over the strong dissent of three Justices who believed that the evidence there showed that counsel's joint representation caused him to forego on appeal a lesser culpability defense for one of the defendants. 107 S. Ct. at 3129-3133 (Blackmun, J., dissenting).

MANSMANN, *Circuit Judge*, dissenting.

The evidence in this case squarely presents us with the age-old truism that no person can properly serve two masters.[1] *See Holloway v. Arkansas*, 435 U.S. 475, 482 (1978)(conflict of interest indicated by "struggle to serve two masters")(quoting *Glasser v. United States*, 315 U.S. 60, 75 (1942)); *Cuyler v. Sullivan*, 446 U.S. 335, 349 (1980).

Because I believe that Evseroff's representation of Gambino was compromised by an actual conflict of interest which did, in fact, adversely affect his performance, I respectfully dissent.[2]

As a preliminary matter I address Judge Sloviter's contention that in our earlier holding in *United States v. Gambino*, 788 F.2d 938 (3d Cir.) *cert. denied* 479 U.S. 825 (1986), we "conclusively decid[ed] that if Gambino produced nothing more than proof" of the omissions he alleged Evseroff had committed "we would not find an actual conflict of interest." This assertion is incorrect and flies directly in the face of our actual determination in the prior appeal that our affirmance of Gambino's conviction was made "*without prejudice* to his ability to initiate a § 2255 collateral proceeding for the resolution of his conflict of interest claim." *Id.* at 953 (emphasis added).

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1. "No man can serve two masters: for either he will hate the one, and love the other; or else he will hold to the one, and despise the other." Matthew 6:24.

2. I agree with Judge Greenberg that the analysis to be undertaken in conflict of interest cases is that set forth in *Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980), which requires a two part analysis once multiple representation is established. The defendant must show an actual conflict of interest and an adverse effect upon counsel's performance. *Id.* at 348. Under either Judge Greenberg's standard or Judge Sloviter's which joins the two inquiries, I believe the facts lead to the inescapable conclusion that Gambino's sixth amendment rights were violated.

In the passage Judge Sloviter relies upon for her assertion that we have, in essence, already conclusively decided Gambino's present conflict of interest case, we merely stated:

> Both parties have advanced various, plausible interpretations of the trial strategy employed by Mr. Evseroff at Rosario Gambino's trial. Consequently, we cannot approach this record with the sanquinity envisioned by *Zepp*. The narrow exception in *Zepp* is tailored to fit only those exceptional situations that lend themselves to only one conclusion -- that trial counsel labored under an actual conflict of interest.

788 F.2d at 953. This passage states nothing more than the fact that we did not view this case as involving the narrow exception set forth in *Government of Virgin Islands v. Zepp*, 748 F.2d 125 (1984), to our general rule that we will not decide conflict of interest cases on direct appeal, without benefit of an evidentiary hearing. *Id.* at 133. *Zepp* carved out a narrow exception to the general rule for cases which, on direct appeal, present an adequate record upon which we can decide the conflict of interest claim. *Id.* Since this was not the case in *Gambino*, we did not feel sanguine, that is, we did not feel cheerfully confident to decide the issue and we, therefore, followed our general rule, affirming Gambino's conviction "without prejudice to his ability to initiate a § 2255 collateral proceeding for the resolution of his conflict of interest claim." 788 F.2d at 953. I conclude that we are unrestricted by our prior decision as we consider this case.

I.

I view the two salient facts in this case to be: (1) that Evseroff was given information which any attorney not suffering from a conflict of interest would

have investigated and (2) that Evseroff admits that he chose not to pursue this evidence, at least in part, because of the loyalty he felt to Mazzara.

It is astonishing to me that an experienced trial lawyer would not raise the fact that a reputed heroin supplier was observed in the vicinity near the time of the crime and was in the same establishment as Spatola, the person the government alleged actually received the heroin, and thus a key actor in the alleged distribution of heroin during a crucial "scene" in the drama on the day of the crime. This is especially so when the precise issue for Evseroff's client at trial was whether that client or some other party had supplied the heroin and when the entire theory of the defense was that some other party had supplied the heroin.

The Supreme Court recently noted that "[a] few bits of unforeseen testimony or a single previously unknown or unnoticed document may significantly shift the relationship between multiple defendants." *Wheat v. United States*, 108 S.Ct. 1692, 1699 (1988) (holding that district court has substantial latitude in refusing waivers of conflicts of interest). The repeated mention of Mazzara in the surveillance logs was exactly this type of information which altered the relationship between Mazzara, Gambino and Evseroff and which created a conflict of interest.

I cannot believe that an attorney not suffering from a conflict, upon learning that Mazzara, a man the attorney knew had been charged with being a major heroin distributor, was on the scene at the critical period in question in the case, and recognizing, as Evseroff acknowledges he did, that there was "substantial evidence" that Mazzara and not his client was the source of the heroin, would not, at a minimum, follow up on such information. Yet Evseroff asked no questions concerning Mazzara, requested no additional evidence of Mazzara's involvement from the

government under *Brady v. Maryland*, 373 U.S. 83 (1963), sought no time for discovery, and did not even open the indictment in his own office which would provide him with the details of the heroin distribution charge levelled at Mazzara, details with which Evseroff claims he was unfamiliar.[3]

Why did he not do so? Evseroff asserts that he considered the possibility that such an argument could open the door to unknown rebuttal evidence possibly connecting Mazzara and Gambino. Yet in all the voluminous reports of government surveillance provided to the defense there was apparently no such link evident.[4] More significantly, Evseroff testified that he did not ask his client, Gambino, if there was any such link. Nor did he request from the government any additional evidence it had of Mazzara's possible involvement in the offense so that he could make an informed decision. Evseroff did nothing.

Evseroff states that he also worried that evidence concerning Mazzara might be inadmissible. Although the district court states that this concern was "well founded," *United States v. Gambino*, No. 84-98, slip op. at 11 (D.N.J. Mar. 10, 1988), neither Evseroff, the government nor the district court suggests a rule of evidence that would bar its admission. In any case Evseroff did not even attempt to introduce such evidence. Such timidity from a criminal defense lawyer of Evseroff's experience is surprising.

Evseroff claims that, while there was "substantial evidence" that Mazzara was the source of the heroin, this evidence would not support a "substantial

3. I do not rely in my conclusions in this case upon any of the evidence made known to Evseroff subsequent to Gambino's trial and which a proper investigation would have disclosed. This evidence provided very strong support for an argument that Mazzara was indeed the supplier and that prosecutors in the Southern District of New York had concluded as much.

4. Evseroff testified that he was aware of no evidence, other than the surveillance logs, which even mentioned Mazzara.

argument" along these lines. This is mere sophistry on Evseroff's part. It is clear that the Mazzara defense argument which occurred to Evseroff was supported, as he states, by "substantial evidence," and was consequently, a substantial argument.

Evseroff also argues that the Mazzara defense might have undermined the credibility of Spatola. However, Spatola had not yet testified at the point in the government's case in chief when Evseroff learned of the Mazzara connection and Evseroff had not yet introduced the Spatola defense to the jury. Evseroff had merely argued that someone other than Gambino supplied the heroin. Evseroff, even if he knew at that point what Spatola would testify to, could have changed his defense entirely or merely added to it, without loss of esteem in the jury's collective eye. Evseroff would not thereby have jeopardized his "good, viable, solid defense" that Gambino was not in Brooklyn on that date and had lent his car to his neighbor.

I view, with great skepticism, the preference by an experienced trial attorney for the exculpatory evidence of Spatola who variously identified his sources as "Giuseppe Saia," the "Little Baron," "Savarino Rosario," "Frank" and "Ignacio in Italy." There was no proof, other than Spatola's testimony, that indicated that any of these individuals ever existed. Mazzara on the other hand not only existed but was observed by government agents in the vicinity near the time of the crime. The gentlemen named by Spatola were never produced at trial. Mazzara on the other hand was a readily available, identifiable individual, and someone Evseroff knew had been charged as a major heroin supplier.

In any case it is a familiar trial tactic to argue in the alternative; that is, Evseroff could have promoted the Spatola defense that the unidentified "Little Baron"

or "Saia" was the source and still could have raised a Mazzara defense as an alternative.

Evseroff testified at the § 2255 hearing that "one of the reasons, one of the factors, that entered into [his] decision not to cross-examine the agents on Mazzara [was that he] did not want to implicate Mazzara, [he] did not want to bring Mazzara's name out in the courtroom because [he] represented him." (App. 60.) This was an improper consideration. Rosario Gambino "was entitled to an attorney who can make a decision to use or not to use testimony *unfettered* by the effect of that decision on his other client's case." *Nealy v. Cabana*, 782 F.2d 1362, 1365 (5th Cir.) *cert. denied* 479 U.S. 819 (1986) (emphasis added).

Foregoing a defense, even in part, because of the desire not to implicate another client precludes a determination that the decision was the result of a tactical judgment as the district court did in the present case. In *United States v. Iorizzo*, 786 F.2d 52 (2d Cir. 1986), the Court of Appeals for the Second Circuit determined that a "conflict of interest led defense counsel to forego a most relevant line of inquiry." *Id.* at 57. The conflict arose because defense counsel had previously represented the government's key witness in a different proceeding. The court reversed the district court, rejecting the argument that the decision to forgo the line of inquiry was "the result of a tactical judgment by a conflict-free lawyer that such testimony would not be helpful to" the defendant.

I agree with Judge Greenberg's acceptance of the definition of "actual conflict of interest" provided in *United States v. Fahey*, 769 F.2d 829 (1st Cir. 1985). That definition required the proof of two elements: (1) a plausible alternative defense, and (2) a conflict of that alternative defense with counsel's other loyalties. *Id.* at 835-36.

I also agree that applying this test to the instant case resolves not only the actual conflict portion of the *Cuyler* test but the adverse effect portion as well. As Judge Greenberg notes "[c]learly, a defendant who establishes that his attorney rejected a plausible defense because it conflicted with the interests of another client establishes not only an actual conflict but the adverse effect of it." Opinion at 17. Once the defendant establishes that there was an actual conflict, he or she need not prove prejudice, but simply that a "lapse in representation" resulted from the conflict. *Cuyler v. Sullivan*, 446 U.S. 335, 349 (1980).

Applying the *Fahey* definition to this case, I would recognize (1) that a plausible alternative defense was available, that is, the Mazzara defense, and (2) that this defense conflicted with Evseroff's loyalty to his client, Mazzara, and perhaps to Evseroff's own pecuniary interest in the fee from the Mazzara representation. Thus, an actual conflict of interest existed.

If Evseroff had an actual conflict of interest, it is clear that that conflict adversely affected his performance. The effect of the conflict lay in the fact of not pursuing the Mazzara defense. Thus the *Cuyler* test is satisfied. A sixth amendment violation has occurred.

II.

My conclusion that Evseroff suffered from an actual conflict of interest is buttressed by the evidence of Evseroff's sworn affidavit which states, *inter alia*, that:

> 6. Representing MR. MAZZARA, as I did at the time, it occurred to me that there was substantial evidence from which an argument could be made that he was the actual source of the heroin which was the subject of this Indictment.

> Nevertheless, when I cross-examined the surveilling agents, I carefully avoided any questions which might have implicated MR. MAZZARA out of a sense of loyalty to him and for fear that I might jeopardize his position in his impending trial.
>
> 7. I did not call to the attention of ROSARIO GAMBINO the observations of Mr. Mazzara contained in the surveillance reports, nor did I discuss with him my belief that an argument could be made that Mr. Mazzara was, in fact, the source of the heroin.

The affidavit was not renounced by Evseroff. The district court attached little weight to it, however, because of the "presence of underlying forces." Despite this assertion the court cites no concrete evidence that these forces existed. The court asserts that the fact that "Carnesi was its draftsman" is one evidence of these forces at work in securing the affidavit. Yet Evseroff testified that, because of time constraints, he asked Carnesi, his friend, to draft the affidavit; that he would not sign the first draft because he did not agree with one of the items in it; that he read the second draft, and then signed it.

The only other "circumstances" which the district court articulates as the basis for its "underlying forces" conclusion were: (1) the fact that Rosario Gambino's brother, who had retained all of the counsel in the case, met post-trial with Evseroff, and (2) that "Mario Gambino was of course at large, having been acquitted at trial." Slip op. at 8. A meeting between Evseroff and the Gambino brother who had retained Evseroff, a meeting which occurred at least fifteen months prior to Evseroff signing the affidavit and more than a year prior to our decision in *Gambino*, would not, without more, normally be considered unusual. Likewise, the

fact that Mario Gambino was "at large" should not serve to discount Evseroff's affidavit. Under our system of justice when a person is acquitted of a crime he is not "at large" -- he is free.

The district court's observations of the demeanor of the witness at the § 2255 hearing are, of course, entitled to deference by us. "This Court carefully observed the demeanor of both Messrs. Carnesi and Evseroff at the hearing. Particularly from Carnesi's lengthy, glib, analytical answers, it appeared to this Court that we were not getting the whole story as to the pressures brought to bear to secure success on the present motion." *Id.* at 9. Nonetheless, the government produced no direct evidence of "underlying forces" at work on Evseroff. Thus, while the court's observation that Carnesi's answers were "lengthy, glib, analytical" can be accepted as true by us, the court's conclusion that there were underlying forces at work in procuring Evseroff's affidavit seems unsupported by the evidence.[5]

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5. On the other hand the government engaged in three concrete actions which may have been targeted at altering Evseroff's position with regard to the conflict of interest. First, the government filed an unethical conduct complaint, predicated upon Evseroff's affidavit, with a New York bar committee. Second, the government informed Evseroff that it would object to his appearance *pro hac vice* in an upcoming case in the District of New Jersey. The third and most questionable action on the government's part was the serving upon Evseroff, by an F.B.I. agent, two weeks prior to the hearing, a subpoena for his income tax returns from 1979 to that time, along with a request for the record of funds received from Gambino and Mazzara. After a meeting between Evseroff's lawyer and the government attorney in charge of this case, at which Evseroff's lawyer disclosed what Evseroff's position would be at the hearing, the demand for the tax returns was withdrawn. The district court determined that Evseroff's testimony was unaffected by these actions.

It should be emphasized that if there is evidence of coercive measures employed by the government against criminal defense

Judge Greenberg is incorrect in concluding that because the district court was permitted to note the fact that Evseroff had defended a person involved in serious organized crime matters and had failed to gain an acquittal, the district court could *ipso facto* dismiss Evseroff's affidavit as merely the result of "underlying forces and pressures," and give the affidavit no credence. This determination by the district court was clearly not only error under the plenary review standard we utilize in conflict of interest cases, it was also, to the extent it was based on fact determinations made by the district court, clearly erroneous.[6]

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attorneys these actions should not be tolerated or ignored by a district court. It is worth noting in this regard that 18 U.S.C. § 1512 prohibits witness tampering ("Whoever knowingly uses intimidation . . . with intent to . . . . influence, delay, or prevent the testimony of any person in an official proceeding" violates this section). This is not to suggest that the district court in this case condoned such activity by the government -- to the contrary, it appears that the court accepted a plausible explanation the government made for its actions. I merely take this opportunity to reemphasize the importance of the principle outlined above.

I further note that we are not required in this decision to determine whether the government had an obligation to raise the conflict issue as a result of the government in the Southern District of New York having determined that Mazzara was supplying heroin to the Gambino family on the day in question.

6. *Burger v. Kemp*, 107 S.Ct. 3114 (1987), does not purport to alter this standard or the cases we relied upon in annunciating the standard. The Court, while deferential to the district court in that case, was equally deferential to the appeals court decision on review. The Court stated: "the regional Courts of Appeal are in a far better position than we are to conduct appellate review of these heavily fact-based rulings." *Id.* at 3121.

It should also be noted that the Court in *Burger* made its deferential comments in the context of examining the competence of an attorney in the course of its conflict of issue determination. The question was whether or not "a lawyer has performed his or her solemn duties in such a case at or above the lower boundary of

In *Government of Virgin Islands v. Zepp*, 748 F.2d 125 (3d Cir. 1984), we defined the standard of review we utilize in conflict of interest cases:

> Whether the representation a defendant received at trial was "constitutionally inadequate" is a mixed question of law and fact. *Strickland v. Washington*, 104 S. Ct. at 2070; *see Cuyler v. Sullivan*, 446 U.S. at 342, 100 S. Ct. at 1714. The "clearly erroneous rule" is inapplicable and we are called upon to "freely review the district court's conclusion." *United States ex rel. Johnson v. Johnson*, 531 F.2d 169, 174 n.12 (3d Cir.), *cert. denied*, 425 U.S. 997, 96 S. Ct. 2214, 48 L.Ed.2d 823 (1976).

Id. at 134.[7]

The district court's conclusion that Evseroff did not raise the Mazzara defense simply because Evseroff concluded that it was specious and could have imperiled the credibility of Gambino's defense, is, like its determination that Evseroff's affidavit was the result of underlying forces, strongly contradicted by

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professional competence." *Id.* at 3121. Competence issues have traditionally been subject to a very deferential standard by the Supreme Court. *Strickland v. Washington*, 466 U.S. 668, 688-90 (1984). Conflict of interest claims as a whole, on the other hand, are governed by a nondeferential standard. *Id.* at 692.

In any case the Court in *Burger* was not faced with the strong direct evidence of an actual conflict of interest presented in this case.

7. The determinations of pure fact made by the district court to support its assertion that there was no conflict of interest in this case are due deference by us. However the determination that there was indeed a conflict of interest is *not* a fact determination and may be freely reviewed by us. Nor need we defer to vague conclusions of the district court, unsupported by facts, that Evseroff's affidavit was the result of underlying forces.

the record and based *not* upon facts but rather upon mere speculation.

IV.

A.

Judge Greenberg apparently intends to discount Gambino's claim with this assertion:

> It seems clear that the existence of an actual conflict and adverse effects from it are more likely to be evident in cases in which an attorney takes positive steps on behalf of one client prejudicial to another than in cases in which the attorney's actions are based on inaction and are passive, as is charged here.

Opinion of the Court at 16. Efforts by counsel which are foresworn due to a conflict are, of course, often harder to demonstrate than improper efforts undertaken. This is precisely why the presumption of prejudice to the defendant exists. *Strickland*, 466 U.S. at 692 ("it is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests"). In fact, the essence of a conflict of interest violation is usually the very inaction and passivity it inspires. "[I]n a case of joint representation of conflicting interests the evil . . . is in what the advocate finds himself compelled to *refrain* from doing." *Holloway v. Arkansas*, 435 U.S. 475, 490 (1978)(emphasis in original). The Supreme Court has recently remarked that "[j]oint representation of conflicting interests is suspect because of what it tends to prevent the attorney from doing." *Wheat v. United States*, 108 S.Ct. 1692, 1697 (1988)(emphasis added) (quoting *Holloway v. Arkansas*, 435 U.S. 475, 489-90 (1978)).

Conflict of interest cases tend, therefore, to have us inquire into sins of omission rather than sins of commission. The truth that inaction is the essence of a conflict of interest problem is born out in the case before us. Evseroff, because of a perceived conflict of interest, refrained from following up in any fashion whatsoever on the Mazzara defense possibility.

Throughout Judge Greenberg's opinion he limits his analysis of Gambino's claim to Evseroff's failure to cross-examine the government's surveillance witnesses. While this contention was certainly important, an even more important omission raised by Gambino is the admitted lack of *follow up* by Evseroff.

B.

Judge Greenberg also writes that Evseroff could not have an actual conflict of interest because nothing "which Evseroff could have done at trial on behalf of appellant but omitted to do could have prejudiced Mazzara," since Mazzara was not a defendant at the same trial. Judge Greenberg is "unable to conceive of how Mazzara would have been prejudiced if Evseroff had used evidence in the government's possession regarding Mazzara to identify Mazzara as the source of the drugs." Yet testimony concerning Mazzara as the source of the heroin *could* have hurt Mazzara at his trial. The government's evidence in the logs was not the only source of prejudice to Mazzara that Evseroff would consider in his decision not to present a Mazzara defense. If Evseroff had presented a full-fledged Mazzara defense, he might have called witnesses who would provide testimony which might incriminate Mazzara. This testimony, if inconsistent, might later be used to impeach those witnesses when testifying against Mazzara in the *Badelemanti* case. *See* Fed. R. Evid. 801(1). If Evseroff uncovered new evidence or witnesses to support an argument that Mazzara was

the source of the heroin, and presented the witnesses and evidence at Gambino's trial, he could have provided further ammunition for the government to use against Mazzara in the *Badelemanti* case. The effort to present Mazzara as the source of heroin would obviously undermine Evseroff's relationship with Mazzara. It goes without saying that most clients would not appreciate their attorney naming them as heroin sources. Additionally, if Evseroff produced sufficient evidence on the subject, it might have led to further charges against Mazzara. Yet Judge Greenberg reaches the remarkable conclusion that "from an objective viewpoint it was a matter of indifference to Mazzara if Evseroff had advanced him as the source of the heroin" at Gambino's trial.

Even if this were the case -- and it clearly was not -- it is not Mazzara's perspective which is important. It is the state of mind of Evseroff which is of crucial importance. If Evseroff labored under the weight of a feeling of loyalty to Mazzara which Evseroff *perceived* was at odds with his representation of Gambino, he suffered from a conflict. He could not perform as an unhampered zealous advocate. This is so whether or not he had reason to have this perception. Similarly, Evseroff would have a conflict whether or not Mazzara perceived one if he perceived that he would lose the fee from his representation of Mazzara, a not unrealistic possibility if he attempted to present Mazzara, charged with heroin distribution, as, in fact, the source of the heroin in question.

The question in conflict of interest cases is whether there has been a "struggle to serve two masters." *See Holloway*, 435 U.S. at 482; *Cuyler*, 446 U.S. at 349. One "master" will always be the client seeking relief. The other master may be another client, but it may also be the financial interest of counsel or some other interest.

Indeed a conflict may arise not only in a multiple representation case as we have before us, but also where there is only one party being represented. *See, e.g., Wood v. Georgia*, 450 U.S. 261, 272 (1981) (potential conflict when "adult" entertainment distributor directly employed and paid defense attorney representing its former employees); *Briguglio v. United States*, 675 F.2d 81, 82-83 (3d Cir. 1982)(per curiam) (remanding for evidentiary hearing when defendant unaware until after verdict that counsel was under criminal investigation and that prosecutor's office refused to discuss plea because of potential invalidation); *United States v. Barnes*, 662 F.2d 777, 782 (D.C. Cir. 1980)(remanding for evidentiary hearing when representation at habeas hearing by counsel alleged to have rendered ineffective assistance on appeal would constitute conflict of interest between attorney and defendant); *United States v. Taylor*, 657 F.2d 92, 94 (6th Cir.)(per curiam) (remanding for inquiry to determine whether defendant's attorneys, under investigation for possession of documents taken from United States Attorney's office, could forcefully pursue client's defense without incriminating themselves further), *cert. denied*, 454 U.S. 1086 (1981). *United States v. Marrera*, 768 F.2d 201, 207 (7th Cir. 1985)(potential conflict when counsel entered into arrangement with defendant to share proceeds from sale of movie rights of defendant's case), *cert. denied*, 475 U.S. 1020 (1986); *United States v. Hearst*, 638 F.2d 1190, 1193 (9th Cir.)(potential conflict in counsel's book contract concerning Patty Hearst trial), *cert. denied*, 451 U.S. 938 (1980).

Judge Greenberg apparently views a conflict of interest as being only a conflict between two clients; while it may result from this situation, it is essentially a tension, a friction, a dissonance, *within* the attorney which does not permit the attorney's single-hearted

zealous advocacy on the part of a particular client. The circumstances surrounding the representation provide the evidence of the conflict. This conflict may occur even where there is no conflict between current clients. *See, e.g., Wood v. Georgia*, 450 U.S. 261, 272 (1981); *Davis v. Stamler*, 650 F.2d 477, 480 (3d Cir. 1981)(requiring disqualification when attorney who represented ex-president of corporation on charge of converting corporate assets had previously represented corporation, acted as interim president, and was potential prosecution witness); *Briguglio v. United States*, 675 F.2d 81, 82-83 (3d Cir. 1982)(per curiam); *United States v. Barnes*, 662 F.2d 777, 782 (D.C. Cir. 1980); *United States v. Taylor*, 657 F.2d 92, 94 (6th Cir.)(per curiam), *cert. denied*, 454 U.S. 1086 (1981); *United States v. Marrera*, 768 F.2d 201, 207 (7th Cir. 1985), *cert. denied*, 475 U.S. 1020 (1986); *United States v. Hearst*, 638 F.2d 1190, 1193 (9th Cir.), *cert. denied*, 451 U.S. 938 (1980).

IV.

I turn now to a concern which I feel underlies this and many other multiple-representation drug cases which engulf our courts. There is a need to formulate a prophylactic rule to govern situations such as those presented to us here. The rule I propose is required by the sixth amendment and frankly, would serve to prevent the waste in time and money which the nondisclosure of potential conflicts engenders by way of satellite litigation and appeal.

While the prophylactic rule suggested is not necessary to the resolution of this case, and while my thoughts on the proposed rule are not etched in stone, I believe that, if adopted, such a rule would safeguard the sixth amendment rights of defendants and encourage counsel to be more forthcoming about potential conflicts of interest so that the issues can be

resolved when resolution is easiest -- in the course of the trial -- rather than on appeal.

I begin with the lawyer's duty to his client. The duty of loyalty to a client is "'perhaps the most basic' responsibility of counsel and 'it is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests.'" *Stickland*, 466 U.S. at 692. A lawyer's duty "runs hard and straight to the client." Penegar, *The Five Pillars of Professionalism*, 49 U. Pitt. L. Rev. 307, 322 (1988). "A lawyer should exercise independent professional judgment on behalf of a client." Model Code of Professional Conduct Canon 5.[8] Indeed, the first ethical consideration under Canon 5 declares:

> The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties. Neither his personal interest, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client.

Id. EC 5-1 (footnote omitted). The duty of loyalty is implicated where he or she represents two or more clients whose affairs somehow intersect. "This problem arises whenever a lawyer is asked to represent two or more clients who may have differing interests, whether such interests be *conflicting, inconsistent, diverse, or otherwise discordant.*" *Id.* EC 5-14 (emphasis added).

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8. The ethical guidelines discussed here are taken from the ABA Model Code of Professional Responsibility. In August, 1983 the ABA replaced the entire Model Code with the Model Rules of Professional Conduct. The ethics rules of the majority of states, however, are still patterned after the Model Code. The Model Rules contain ethical guidelines concerning conflicts of interest which, in general, parallel those in the Model Code discussed here. *See* ABA Model Rules of Professional Conduct Rule 1.7 and comment.

Even where there are merely "potentially differing interests," the lawyer "should resolve all doubts against the propriety of representation. A lawyer should never represent in litigation multiple clients with differing interests." *Id.* EC 5-15.

Where multiple representation is permitted it should only be undertaken with the fully informed approval of the client. Ethical Canon 5-16 of the Model Code of Professional Responsibility states:

> In those instances in which a lawyer is justified in representing two or more clients having differing interests, it is nevertheless essential that each client be given the opportunity to evaluate his need for representation free of any potential conflict and to obtain other counsel if he so desires. Thus, before a lawyer may represent multiple clients, he should explain fully to each client the implications of the common representation and should accept or continue employment only if the clients consent."

During the course of a trial counsel who recognizes a potential conflict has a duty to inform not only his other client but the court as well. In *Cuyler* the Supreme Court noted that: "Defense counsel have an ethical obligation to avoid conflicting representations and to advise the court promptly when a conflict of interest arises during the course of trial . . . . [t]rial courts necessarily rely in large measure upon the good faith and good judgment of defense counsel." 446 U.S. at 346-47 (footnote omitted). The Court explained that defense counsel "'is in the best position professionally and ethically to determine when conflict of interest exists or will probably develop in the course of a trial.'" *Id.* at 347 (quoting *Holloway v. Arkansas*, 435 U.S. at 485 and *State v. Davis*, 110 Ariz. 29, 31, 514 P.2d 1025 (1973)).

While the attorney has the burden to come forward with potential conflicts, we also must recognize that there are pressures upon defense counsel that countervail against the performance of this ethical responsibility. "Privately retained lawyers are subject to economic pressures and consequently cannot be relied on to alert clients to conflicts of interest." Lowenthal, *Joint Representation in Criminal Cases: A Critical Appraisal*, 64 Va. L. Rev. 939, 985 (1978).

A prophylactic rule is therefore necessary in order to assist and encourage absolute forthrightness on the part of counsel so that the client and the court may decide the close issues involving potential conflicts rather than leaving that responsibility to the attorney who may be tempted to breach his or her responsibility because he "'hate[s] to give up a fee.'" *Id.* at 962, n.69 (quoting public defender).

The rule I propose is distilled from the ethical considerations outlined above. The Supreme Court has recognized that "prevailing norms of practice as reflected in the American Bar Association standards and the like" may serve as guides in determining what is reasonable conduct by counsel in a sixth amendment analysis. *Strickland*, 466 U.S. at 688. These guides cannot be developed into a detailed set of rules for counsel's performance because of the limiting effect such rules would have on counsel's independence and ability to make tactical decisions during trial. *id.* at 688-69. The Court, however, in the conflict of interest context has departed from the deferential reasonableness standard applied to general adequacy of representation cases. *Id.* at 692. The Court has created a rule that inadequate representation will be *presumed* where an actual conflict of interest adversely affects the performance of counsel. *Id.*

The Court has not comprehensively defined "actual conflict of interest." We may, therefore, turn to

the ethical standards adopted by the American Bar Association, and outlined above, to guide our definition of this term.

We have previously held, that in a conflict of interest case, non-conformance with the rules of professional responsibility by an attorney representing a criminal defendant shall guide our examination of whether or not that defendant's sixth amendment rights were infringed. *United States v. Dolan*, 570 F.2d 1177, 1184 (3d Cir. 1978) ("we hold that when a trial court finds an actual conflict of interest which impairs the ability of a criminal defendant's chosen counsel to conform with the ABA Code of Professional Responsibility, the court should not be required to tolerate an inadequate representation of a defendant"). Other courts have similarly found defense counsel's violation of, or compliance with, ABA and other ethical standards as a pertinent consideration in the resolution of sixth amendment conflict of interest claims. *See, e.g., United States v. Bernstein*, 533 F.2d 775 (2d Cir.), *cert. denied*, 429 U.S. 998 (1976); *United States v. Jeffers*, 520 F.2d 1256 (7th Cir. 1975), *cert. denied*, 423 U.S. 1066 (1976); *In Re Rappaport*, 558 F.2d 87 (2d Cir. 1977); *United States v. Siegner*, 498 F. Supp. 282 (E.D. Pa. 1980); *United States v. Helton*, 471 F. Supp. 397 (S.D.N.Y., 1979); *United States v. Turkish*, 470 F. Supp. 903 (S.D.N.Y. 1978); *United States v. RMI Co.*, 467 F. Supp. 915 (W.D. Pa. 1979).

Using the guidance provided by the ethical rules outlined above, I would adopt a prophylactic rule which would require that, when, during the course of a trial, counsel becomes aware that he or she is subject to an interest which is "conflicting, inconsistent, diverse or otherwise discordant" with the interest of the client being tried, that attorney should, at the first opportunity, reveal this potential conflict to the client

and the court. *See* Model Code of Professional Conduct EC 5-15. Failure to do so would result in a rebuttable presumption that an actual conflict existed. The client would retain the burden of proving adverse effect on the client's representation. *See Cuyler*, 446 U.S. at 348.[9]

If such a rule inspires counsel to be more forthcoming in disclosing potential conflicts of interest to his client and the court, the benefits of the rule are great. A conflict of interest denies a defendant a fundamental constitutional right. A conflict of interest appeal results in, at a minimum, waste of appellate time which the taxpayers pay for, and, at worst, the retrial of a defendant whose first trial, with all of its attendant costs, could have resulted in a valid conviction. *See People v. Baker*, 268 Cal.App.2d 254, 260, 73 Cal.Rptr. 758, 763 (1968). The proper functioning of our adversarial system of criminal justice is dependent upon the zealous advocacy of client's interests by lawyers. Both individual clients and the criminal justice system suffer when advocacy is impaired by a conflict of interest.

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9. In *Cuyler* the Court stated:

> Since a possible conflict inheres in almost every instance of multiple representation, a defendant who objects to multiple representation must have the opportunity to show that potential conflicts impermissibly imperil his right to a fair trial. But unless the trial court fails to afford such an opportunity, a reviewing court cannot presume that the possibility for conflict has resulted in ineffective assistance of counsel.

446 U.S. at 348. Since ineffective assistance of counsel which requires *both* an actual conflict of interest *and* an adverse effect upon the lawyer's performance is not being presumed under the proposed rule, and since the Court in *Cuyler* was not speaking to the issue of the nondisclosure to the client or court of potential conflicts of interest, the above statement from *Cuyler* does not preclude the proposed prophylactic rule.

Such a rule is subject to possible abuse. An unscrupulous defendant and counsel could conspire to create an undisclosed conflict of interest in the hope of winning a new trial should the defendant lose. The potential sanctions against the attorney, in the rarest of cases might not prevent such abuse. Such a scenario is, of course, possible even with the present definition of actual conflict of interest. In any case the benefits of the proposed rule far outweigh the costs which might result in the rarest of rare cases where an attorney conspires with a client to create a conflict of interest.

The application of the proposed rule to the present case would produce the same result as that produced by way of the traditional analysis undertaken previously. Under the proposed rule, since the government has been unable to rebut the presumption that Evseroff's potential conflict resulted in an actual conflict of interest, and since the adverse effect on Gambino's representation, as discussed above, is clear to me, Gambino's sixth amendment rights were violated by a conflict of interest.

V.

Because Evseroff suffered from an actual conflict of interest in his representation of Rosario Gambino and because that conflict adversely affected his performance on behalf of Gambino, I would reverse the judgment of the district court and remand for a new trial.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

88-1621
No.

Supreme Court, U.S.
FILED
MAR 31 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

ROSARIO GAMBINO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA :
Criminal No. 84-98
v. :
OPINION
ROSARIO GAMBINO :

APPEARANCE:

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BISSELL, District Judge

This matter comes before the Court pursuant to the motion of Rosario Gambino ("Rosario") under 28 U.S.C. sec. 2255 to vacate his conviction in this case because of the alleged deprivation of his Sixth

Amendment right to the effective assistance of counsel during the trial. The underlying thesis of this motion is that because his trial attorney, Jacob Evseroff, Esquire, also represented a defendant in another federal criminal case, a conflict of interest arose which precluded Evseroff from effectively cross-examining government witnesses and otherwise developing a line of defense that would have benefited Rosario but at that same time imperiled his other client whose trial had not yet been. For reasons amplified below the motion is denied.

The procedural and factual background in this matter has been stated extensively in two published and one unpublished opinions entitled United States v. Gambino, 598 F.Supp. 646 (D.N.J. 1984), aff'd., 788 F.2d 938 (3d Cir. 1986), and United States of America v. Rosario Gambino, Docket No. Crim. 84-98 (D.N.J.

May 25, 1985) (Lacey, J.). Accordingly, this Court will not undertake here a lengthy recitation of the procedural history or factual underpinnings of the defendant's conviction upon charges of conspiracy and trafficking in heroin. Rather, the Court will limit its factual observations and findings to those particularly material to its decision on the present motion.

On December 11, 1984 Rosario was sentenced to 45 years' imprisonment and fined $105,000 following a trial before Judge Frederick B. Lacey and a jury, which convicted him on one count of conspiracy to distribute heroin; two counts of possession of heroin with intent to distribute; two counts of distribution of heroin; and one count of using a telephone to facilitate the conspiracy. Evidence regarding the charges included January 18, 1984 and February 20, 1984 sales of one-

half kilogram of heroin to a federal undercover agent by co-conspirators Anthony Spatola and Giovanni Bosco, for whom Rosario was said to be the source of supply.

Shortly after the conviction of Rosario and the other co-defendants (with the exception of Mario Gambino who was acquitted) the latter's attorney, Charles F. Carnesi, Esquire, was exploring materials provided in pretrial discovery in the now legendary "Pizza Connection" case in the Southern District of New York, United States of America v. Badalamenti, et al., Docket No. SS 84Cr236. Carnesi undertook this endeavor in order to make a decision as to whether he would accept the representation of one of the defendants in that case. In doing so, Carnesi came across brief excerpts in an affidavit and a pretrial memorandum, both generated by the United States, which indicated that

Gaetano Mazzara had supplied heroin on January 17, 1984 which had shortly thereafter been sold to government undercover agents in Atlantic City. It was immediately apparent to Carnesi, who had been presnt throughout the entire trial in this Court, that this was the same heroin as to which the government had accused Rosario of being the supplier, at the same location (Cafe Milano, 18th Avenue, Brooklyn, New York), on the same date.

This discovery by Carnesi, which occurred while the appeal from the defendant's conviction was pending before the Third Circuit, resulted in a motion for a new trial before Judge Lacey under Fed.R.Crim.P. 33. In the unpublished opinion cited above, Judge Lacey denied the motion for a new trial essentially on the grounds that the materials uncovered in the Badalamenti case had been public,

and therefore available to Mr. Evseroff, prior to the Gambino trial, and that Jencks Act material (Exh. J-146) produced during the Gambino trial had also given to Mr. Evseroff adequate notice and opportunity to develop the "Mazzara defense" had he chosen to do so. Accordingly, Judge Lacey determined that there was no "newly discovered evidence" within the contemplation of Rule 33. This decision was among those reviewed in that portion of the Third Circuit opinion addressing the present conflict of interest claim. 788 F.2d 938, 949-953. In concluding its analysis at that time the Third Circuit stated:

> Our past precedent compels us to affirm the conviction of appellant Rosario Gambino without prejudice to his ability to initiate a sec. 2255 collateral proceeding for the resolution of his conflict of interest claim."

Pursuant to this direction, and through the considerable efforts of Mr.

Carnesi which will be discussed more fully below, Rosario's appellate counsel (Herald Price Fahringer, Esquire) procured from Mr. Evseroff an affidavit dated June 9, 1986. That affidavit, which was admitted into evidence during the course of the subsequent hearing before this Court, is annexed hereto as Exhibit A. The evidentiary hearing was conducted on October 31, 1986, both preceded and succeeded by briefs filed by both sides addressing the trial record, the hearing record and applicable principles of law. Among the exhibits to which the Court was cited is the surveillance log, J-146, attached hereto as Exhibit B.

The foundation for the present claim of ineffective assistance of counsel based upon conflict of interest is the statement in Mr. Evseroff's affidavit, admittedly drafted by Carnesi:

Representing MR. MAZZARA, as I did

> at the time, it occurred to me that there was substantial evidence from which an argument could be made that he was the actual source of the heroin which was the subject of this Indictment. Nevertheless, when I cross-examined the surveilling agents, I carefully avoided any questions which might have implicated MR. MAZZARA, out of a sense of loyalty to him and for fear that I might jeopardize his position in his impending trial.

(Evseroff Aff., June 9, 1986, para. 6).

It is undisputed that conflicts of interest with Sixth Amendment consequences can arise even under circumstances where the second client represented by the attorney is not a party to the same case as the complaining client. The general principles of law applicable to the present matter may be enunciated as follows:

> In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances. * * * No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of

legitimate decisions regarding how best to represent a criminal defendant. Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions. * * * Moreover, the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation, although that is a goal of considerable importance to the legal system. The purpose is simply to ensure that criminal defendants receive a fair trial.

Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to secondguess counsel's assistance after conviction of adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. Cf. Engle v. Isaac, 456 U.S. 107, 133-134, 71 L.Ed.2d 783, 102 S.Ct. 1558 (1982). A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.

* * *

The availability of intrusive post-trial inquiry into attorney performance or of detailed guidelines for its evaluation would encourage the proliferation of ineffectiveness challenges. Criminal trials resolved unfavorably to the defendant would increasingly come to be followed by a second trial, this one of counsel's unsuccessful defense. Counsel's performance and even willingness to serve could be adversely affected. Intensive scrutiny of counsel and rigid requirements for acceptable assistance could dampen the ardor and impair the independence of defense counsel, discourage the acceptance of assigned cases, and undermine the trust between attorney and client.

Thus, a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The Court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the

> adversarial testing process work in the particular case. At the same time, the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.

Strickland v. Washington, 466 U.S. 668, 688-90 (1984). Because this is an alleged conflict of interest case, this Court had analyzed Mr. Evseroff's decision not to pursue a "Mazzara defense" without affording to him any presumption such as that suggested in the final sentence of the foregoing excerpt from the Strickland opinion. Indeed, where actual conflict of interest is proven, prejudice to the defendant is presumed; however, that presumption does not relieve the defendant of his burden of proving under Cuyler [v. Sullivan, 446 U.S. 335 (1980)] the existence of an "actual conflict of interest [which] adversely affected his lawyer's performance." United States v. Gambino, 788 F.2d 938, 951 (3d Cir. 1986),

cert. denied, 107 S.Ct. 98 (1986).

> Since a possible conflict [of interest] inheres in almost every instance of multiple representation * * * the possibility of conflict is insuffficient to impugn a criminal conviction. In order to demonstrate a volation of his Sixth Amendment rights, a defendant must establish that an actual conflict of interest adversely affected his lawyer's performance.

Cuyler v. Sullivan, 446 U.S. 335, 348, 350 (1980); see also Strickland v. Washington, 466 U.S. at 692.

> Actual conflict of interest is evidence if, during the course of the representation, the defenant's interests diverge with respect to a material factual or legal issue or to a couse of action [citation omitted]. This conflict must cause some lapse in representation contrary to the defendant's interests but such lapse need not rise to the level of actual prejudice.

Sullivan v. Cuyler, 723 F.2d 1077, 1086 (3d Cir. 1983). Accord, United States v. Gambino, 788 F.2d at 951-53.

This Court is equally conscious that it is not conducting a disciplinary proceeding, as might a state supreme court

or its designee. It is this Court's function to determine whether a direct conflict of interest existed and, if so, whether the acts of Mr. Evseroff in the face of such a conflict deprived Rosario Gambino of effective assistance of counsel. In this Court's view, both of those questions must be answered in the negative.

This Court attaches little weight to the brief, oversimplified statements in the Evseroff affidavit. It was procured in order to generate the present hearing. Although the affidavit was redrafted once at Evseroff's request, Carnesi was its draftsman. There were port-trial meetings between Evseroff and one Guiseppe Gambino, Rosario's brother; who had retained all the lawyers in the case. H.Tr. 186. Mario Gambino was of course at large, having been acquitted at trial. The circumstances under which this affidavit

was procured demonstrated to this Court the presence of underlying forces and pressures propelling and compelling Mr. Carnesi to undertake a course of conduct completely unrelated to the interests of either his New Jersey or New York client and Mr. Evseroff to impugn his professional reputation and imperil his license to practice law, in order to overturn the conviction of the man proved at trial to be at the apex of the conspiracy and distribution of heroin by the Gambino family in New Jersey.

This Court, in ruling on questions of credibility, including the circumstances under which this affidavit was procured as set forth in the hearing record, believes that it is not engaging in fatal speculation when it concludes that there is more here than meets the eye. This court carefully observed the demeanor of both Messrs. Carnesi and Evseroff at the

hearing. Particularly from Carnesi's lengthy, glib, analytical answers, it appeared to this Court that we were not getting the whole story as to the pressures brought to bear to secure success on the present motion.

Evseroff, on the other hand, laid bare his thought processes at the time he was presented with Exh. J-146 and presented a credible picture of an experienced trial lawyer making legitimate, reasonable choices regarding a course of cross-examination and the pursuit of one or more defenses, as elaborated below.1

Exhibit J-146 was delivered to Mr. Evseroff, during the trial, shortly before commencing the cross-examination of FBI agent Genkinger. Undoubtedly he took

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1 That credibility was not impeached in this Court's eyes by the intervention of grievance proceedings in New York predicated upon the present incident.

notice of the entry in that log of the departure of Rosario Gambino's yellow Mercedes from in front of the Cafe Milano on 18th Avenue, Brooklyn, at 2:40 P.M. on January 17, 1984. Only Genkinger of the host of agents at the scene had observed this vehicle, a fact which Evseroff developed fully upon his cross-examination. Evseroff also noticed in J-146 agents' observation of Gaetano Mazzara and his cohort Francesco Castronovo in the area of Cafe Milano and a tile company next door during the time period 2:58 to 3:41 P.M. Defendant Anthony Spatola, the man who unquestionably was arranging for the purchases of heroin for delivery in New Jersey, was also in this area throughout the time periods mentioned above. As of the trial in the present case, this is all that Evseroff actually knew about the presence of Mazzara in the area of the Cafe Milano on the same day as

the acquisition of heroin which became the subject of the present prosecution. Although Judge Lacey determined that the materials supplied in the Badalamenti prosecution did not qualify as "newly discovered evidence" within the purview of Rule 33, Evseroff was not in fact aware of those materials or the position of the government in that prosecution that Mazzara had supplied the particular heroin delivered on that date.

Furthermore, Evseroff knew that it was the government's position that Spatola had not taken delivery of the heroin in question until well after 11:00 P.M. on January 17, subsequent to a second visit by Rosario Gambino's yellow Mercedes to the immediate vicinity of the Cafe Milano. Evseroff was also aware, from the tapes of recorded telephone conversations, that Spatola did not report the fact that he had obtained possession of the heroin

until after midnight on that date. Accordingly, even though he knew, through his representation of Mazzara, that the latter had been charged in the Southern District of New York as a substantial heroin dealer, Evseroff in truth had very little actual knowledge linking Mazzara to the actual sale or delivery to Spatola of the heroin in question.2

Evseroff explained to the satisfaction of this Court his comment about not seeking to implicate Mr. Mazzara "out of a sense of loyalty to him and for fear that I might jeopardize his position in this impending trial." Evseroff Aff., supra. As he explained, he felt that it would be unfair to Mazzara to cast him as the heroin source on such flimsy evidence

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2 The later revelation of the presence of one Joseph La Rosa (also a Mazzara cohort) at Cafe Milano, after 11:00 P.M., at the same time the yellow Mercedes was there, would not reasonably be inclined to exculpate Rosario.

as that provided in Exh. J-146. H. Tr. 18-19. This was a reasonable exercise of professional judgment, not in conflict with the representation of Rosario Gambino's interests. As Evseroff himself testified, to have raised a tenuous, specious defense based upon the presence of Mazzara in the area at mid-afternoon approximately eight hours before delivery of the heroin, could have imperiled the credibility of his client's entire defense. Furthermore, Evseroff had serious, well-founded concerns as to whether the New York accusations against Mazzara would even be admitted into evidence in the New Jersey trial. If not, the effort to characterize Mazzara as the source of the heroin would be totally ineffectual. Additionally, Evseroff had no idea as to what evidence the government might have linking Mazzara and Rosario Gambino. What could have been more

foolish than to launch a "Mazzara defense" through the cross-examination of government witnesses only to be confronted with rebuttal evidence so linking Mazzara and Rosario as to fortify a government argument that both were involved in the delivery of the January 17 heroin? Under the circumstances, while Evseroff apparently felt "free" to state in his affidavit "that there was substantial evidence from which an argument could be made that [Mazzara] was the actual source of the heroin which was the subject of this Indictment," he testified with compelling force and logic that that was not an argument which he would adopt in his professional judgment and that Rosario Gambino's interests would not be served by proceeding down that uncharted path.

This was not all, however. Although he was not absolutely certain, Evseroff's best recollection was that he knew, prior

to the production of Exh. J-146 for the cross-examination of government agents, that the defendant Spatola would testify that a person named Guiseppe Saia was the source of the January 17 heroin. The success of Rosario Gambino's ultimate defense that he was not involved in heroin trafficking, was not involved in the sales in question, and was not even in the area of the Cafe Milano on January 17, 1984, depended in large measure upon the credibility of Anthony Spatola. Once again, Evseroff engaged in a reasonable exercise of professional judgment in deciding not only that the "Mazzara defense" was so tenuous as to inherently imperil the credibility of his case, but would have been so contradictory to the testimony of Spatola as to equally imperil any benefit to Rosario from that testimony. Stated otherwise, the coordination of defense theories and

evidence was vitally important to any success for which Rosario might entertain hopes. That strategy was pursued by the defendants throughout the trial and met with partial success to the extent that both Rosario and Erasmo Gambino were acquitted of the most serious charge in the present indictment, the conduct of a continuing criminal enterprise under 21 U.S.C. sec. 848.

This Court has also reviewed pertinent aspects of the trial record, including the use of made of Exh. J-146 in cross-examination conducted by Mr. Evseroff and his summation before the jury. Employing the evidence presented by other defendants, particularly as it aided his client, Mr. Evseroff ably developed Rosario's defense of noninvolvement, supported by the testimony of serveral witnesses including one Carlo Filiberto, a neighbor of Rosario, who claimed to have

borrowed the yellow Mercedes on January 17 and driven alone to the 18th Avenue area on personal errands. The credibility of that defense could only have been compromised had a jury determined that a "Mazzara defense" was incredible or represented grasping at straws. Furthermore, a "Mazzara defense" was tenuous at best and fraught with the peril of creating either evidence, argument or both that Mazzara and Rosario Gambino had both been involved in supplying the January 17 heroin.

Accordingly, there was no actual conflict between the interests of Mazzara and Rosario. It was completely consistent with Evseroff's representation of both clients that he not launch blindly a "Mazzara defense" in the Gambino litigation. The interests of Rosario were best served by this decision and the defense developed for him was a good one,

had the witnesses supporting it been believed. No Sixth Amendment claim can be maintained here where the failure of Rosario's defense turned upon a legitimate exercise by the jury of its function of assessing the credibility of witnesses.

Finally, even if it might be said that a possible conflict existed because of the potential that Mazzara and not Rosario was the source of the January 17 heroin, that in itself is extremely speculative for reasons discussed above. Indeed, even the evidence now available, including the Badalamenti materials, would be equally consistent with an inference either that Mazzara, who had departed the area nearly eight hours earlier, was not the source of the January 17 heroin or that both Mazzara and Rosario Gambino were engeged in the distribution chain on that date. Indeed, the evidence garnered from the intercepted telephone

conversations strongly indicated that the Gambino group had to look to a different source (above and inferentially through Rosario) for the January 17 heroin.

For the reasons set forth above, this Court determines that there was nether an actual conflict of interest nor any adverse affect upon Mr. Evseroff's performance as Rosario's trial attorney in this matter. 3

The motion is denied. A copy of an order is enclosed.

s/

John W. Bissell
United States District Judge

DATED: March 10, 1988

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3 This Court determines that United States v. Carducci, 557 F. Supp. 531 (W.D. Pa. 1983) does not demand a different result. That decision is predicated upon a determination, based on the facts therein: "The conflict is clear." Id. at
(footnote continues on next page)

3 (footnote continuing from previous page) 533. As this Court's analysis above demonstrates, there is no actual conflict of interest in the case at bar. Furthermore, in Carducci, the adverse effect upon the lawyer's performance in advancing an entrapment defense was equally clear. That is not so here where the success of Rosario Gambino's defenses, closely coordinated with evidence produced by other defendants, would have inevitably been hindered by the pursuit at trial of the "Mazzara defense." The Court has also considered the other peripheral and related arguments advanced by Rosario in the present motion. To the extent they are not addressed above, this Court found them to be without merit, either individually or cumulatively.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 84-5842, 84-5843, 84-5866,
84-5880 & 85-5396

UNITED STATES OF AMERICA

v.

GAMBINO, ROSARIO, ERASMO GAMBINO,
ANTONIO GAMBINO, AND ANTHONY SPATOLA,

Appellants

On Appeal from the United States
District Court for the
District of New Jersey
(D.C. Crim. No. 84-00098-01)
(D.C. Crim. No. 84-00098-02)
(D.C. Crim. No. 84-00098-05)
(D.C. Crim. No. 84-00098-04)

Argued: January 8, 1986

Before: WEIS, HIGGINBOTHAM and BECKER,
Circuit Judges
(Filed APRIL 18, 1986)

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OPINION OF THE COURT

A. LEON HIGGINBOTHAM, JR., *Circuit Court.*

Appellants[1] Rosario Gambino, Erasmo Gambino, Antonio Gambino and Anthony Spatola were indicted by a federal grand jury on multiple counts of narcotics related offenses. They were convicted *inter alia* of conspiring to distribute heroin in violation of 21 U.S.C. § 846. Appellants now appeal from their judgments of conviction. Alternatively, appellants urge that their sentences be vacated and their cases remanded for resentencing. For the reasons set forth below, we will affirm the district court.

I.

Pursuant to a multi-count indictment, appellants Rosario Gambino, Erasmo Gambino, Antonio Gambino, and Anthony Spatola were convicted of conspiracy to distribute heroin in violation of 21 U.S.C. § 846. Indicted along with appellants on the conspiracy charge and related offenses were Mario Gambino and Giovanni Bosco. At the conclusion of the trial, Mario Gambino was acquitted on all counts with which he was charged. Bosco remained a fugitive throughout the trial. Rosario Gambino, Erasmo Gambino, and Anthony Spatola were convicted on two counts of possession of heroin and two counts of distribution of heroin in contravention of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(A). Antonio Gambino was

1. Because three of the appellants bear the same surname, Gambino, for purposes of clarity they will be referred to by either their full names or their first names.

convicted on three counts of those offenses. The remaining counts contained charges of using the telephone to facilitate a conspiracy to distribute heroin in violation of 21 U.S.C. §§ 843(b) and (c). Rosario Gambino was convicted on one count of this offense; Erasmo Gambino, on two counts; Antonio Gambino, on three counts; and Anthony Spatola, on six counts.

Subsequent to the jury verdict, the district court imposed the following sentences on the defendants:

> Rosario Gambino - three consecutive fifteen-year prisons terms; one concurrent four-year term; terms of Special Parole, and total fines of $105,000.
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> Erasmo Gambino - two consecutive fifteen-year prison terms; one concurrent fifteen-year prison term; two concurrent four-year terms; terms of Special Parole, and total fines of $95,000.
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> Antonio Gambino - two consecutive fifteen-year prison terms; two concurrent fifteen-year prison terms; three four-year prison terms concurrent with each other and consecutive to the fifteen-year prison terms; terms of Special Parole, and total fines of $50,000.
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> Anthony Spatola - two consecutive fifteen-year prison terms; one concurrent fifteen-year prison term; six four-year prison terms concurrent with each other and consecutive with the fifteen-year prison terms; Special Parole, and total fines of $50,000.

Three primary questions are presented on this appeal from the district court's entry of judgments of conviction against the appellants for conspiracy to distribute heroin and against each of them individually for various related substantive offenses: (1) whether the evidence adduced at trial established the

impermissible entrapment of appellant Antonio Gambino as a matter of law; (2) whether the district court abused its discretion pursuant to Federal Rule of Criminal Procedure 23(b) by allowing deliberations to proceed with an eleven person jury despite the availability of an alternate juror, or alternatively, whether the district court committed legal error in interpreting Rule 23(b) as precluding substitution of alternate jurors; and (3) whether appellant Rosario Gambino's sixth amendment right to effective assistance of counsel was violated because his trial lawyer's performance was adversely affected by a conflict of interest.[2]

II.

FACTUAL BACKGROUND

Antonio Gambino

On October 23, 1983, during the course of an undercover operation investigating drug trafficking in

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2. Other contentions raised by the appellants not directly addressed in this opinion, include:

1. That remarks made by the prosecution in summation attacking the credibility of Anthony Spatola denied Rosario Gambino due process and a fair trial.

2. That the district court erred in denying Rosario Gambino's motion for a new trial and a motion for related discovery.

3. That appellants were denied a fair trial when the district court permitted the prosecutor to read an alleged prejudicial newspaper article to the jury.

4. That Antonio Gambino's due process rights were violated by outrageous government conduct.

After thoroughly reviewing the above contentions, we conclude that they lack merit. Accordingly, the judgment of the district court will be affirmed.

the New Jersey area, Special Agent Michael Glass of the Federal Bureau of Investigation was introduced to Antonio Gambino by a government informant called "Hank." During the meeting, which was recorded by Agent Glass, Antonio Gambino agreed to sell Glass a small quantity of cocaine and also indicated that he had access to and could provide Glass with a sample of heroin. App. 1641a-1644a, 1654a-1656a. While Antonio never specifically disclosed the source of his drug supply, he intimated that his suppliers were members of his family. *See* App. 166a, 758a.

Following this meeting, Antonio met with Agent Glass on a number of occasions to sell cocaine and to continue discussions about the impending heroin deal. On December 27, 1983, shortly over two months after their initial meeting, Antonio Gambino supplied Agent Glass with a sample of heroin. Glass was in turn to deliver the sample to his contacts in Las Vegas who would then decide, based upon the quality of the sample, whether they wanted to purchase a kilogram. App. 781a-789a. Three days later, on December 30, 1983, Agent Glass telephoned Antonio and informed him that the sample was satisfactory and that he was interested in consummating their proposed heroin deal.

In another series of recorded conversations, Antonio Gambino, using code language, discussed the arrangements for the drug deal with various people. Thereafter, on January 18, 1984, Antonio Gambino, together with two of his co-conspirators, Anthony Spatola and Giovanni Bosco,[3] delivered approximately

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3. Giovanni Bosco was a co-defendant in the underlying action. At the time of trial Bosco had not been arrested and remained a fugitive for over year. He was apprehended on April 19, 1985 and was awaiting trial at the time of this appeal.

one half kilogram of heroin to Agent Glass and two other undercover agents. The transaction took place between Rooms 311 and 858 of Caesar's Boardwalk Regency Hotel in Atlantic City, New Jersey and was secretly videotaped by the FBI. On February 20, 1984, Antonio Gambino participated in the sale of a second half kilogram of heroin to Agent Glass and another undercover agent. Antonio Gambino's particular objection on appeal is that the evidence adduced at trial demonstrated entrapment as a matter of law.

Anthony Spatola

Immediately after Agent Glass authorized Antonio Gambino to negotiate the purchase of one kilogram of heroin, Anthony Spatola made a series of phone calls, which were intercepted by authorized wiretaps, attempting to contact Erasmo Gambino. Eventually a meeting between Erasmo Gambino and Anthony Spatola was arranged to discuss the proposed transaction. Spatola met with Erasmo at the Playboy Casino Hotel on January 3, 1984. On the following evening, Spatola was introduced to Agent Glass by Antonio Gambino in a meeting devoted to discussing the mechanics of the proposed heroin purchase. Agent Glass was required to wear a bathing suit and meet with Spatola in a jacuzzi at the Golden Eagle Motel in Cape May to assure that the meeting was not being recorded. App. 855a-857a. The heroin sale was scheduled for January 16 or 17.

On January 13, 1984, Agent Glass telephoned Antonio Gambino to advise him that all financial and personnel arrangements necessary for the completion of the heroin deal had been made. Glass suggested that the transaction occur on Tuesday, January 17, 1984. During this discussion, Antonio Gambino extensively used code language to refer to the heroin purchase, particularly employing references related to "marriage"

and "cars." App. 241a-251a. Immediately thereafter, Antonio Gambino phoned Spatola and informed him that the sale would take place on Tuesday. App. 253a, 871a. Similar code language was used in this conversation and in a subsequent conversation between Spatola and Erasmo Gambino in which the two discussed the need to pick up the "fiance", i.e., heroin, on Monday.

Prior to the sale, intercepted telephone conversations and observations of surveillance agents revealed that Spatola made numerous attempts to contact Rosario and Erasmo Gambino either to obtain approval of the pending negotiations or to obtain the heroin for the drug deal. Ultimately, Spatola was present for the actual heroin sales on both January 19, 1984 and February 20, 1984. Spatola's appeal focuses on the propriety of the eleven person jury verdict.

Erasmo Gambino

Following Erasmo Gambino's meeting with Spatola at the Playboy Casino Hotel, a series of intercepted phone calls involving Antonio Gambino and Spatola revealed their persistent efforts to again contact Erasmo apparently to enlist his assistance in obtaining the heroin for the impending deal. App. 264a-265a, 270a-274a. Three of those calls were placed to the Caffe Milano in Brooklyn, New York. App. 275a-276a, 284a, 286a. Finally, on January 17, 1984, Erasmo placed a collect call to Spatola and told him that there had been a delay and that the sale could not be completed until Thursday. App. 306a-307a. After further efforts on the part of Spatola and Antonio Gambino, however, a sale of approximately one half kilogram of heroin was arranged and completed early Wednesday morning.

During the discussions surrounding the transaction that morning, Antonio Gambino and

Spatola discussed with undercover agents the possibility of providing a steady supply of heroin. App. 400a-438a. Left unresolved was the amount of heroin Antonio and Spatola would be able to produce on a monthly basis. On January 20, 1984 Antonio Gambino met with Special Agent Glass to continue discussions about future sales. App. 1048a-53a. Agent Glass told Antonio that before another deal could be approved, the quality of the heroin purchased two days earlier had to be tested. App. 1057a. Later that same day, Antonio had a telephone conversation with Erasmo Gambino in which Antonio stated "I spoke with him today . . . and he told me, its because he has to speak to that guy -- the other guy, no?" App. 456a-57a. Antonio then suggested that he call Erasmo in five minutes from an "outside phone" so that he could "speak more freely." *Id.*

Two other phone calls involving Erasmo Gambino from which his involvement in the drug transactions could be inferred were intercepted by authorized wiretap on January 22, 1984. App. 503a, 546a. Prior to the sale of the second half kilogram, Erasmo was observed with Spatola and Giovanni Bosco in Brooklyn at the Caffe Milano on February 2, 1984. App. 2667a-2670a. Several days later Erasmo apparently met with Spatola and Antonio Gambino in Philadelphia. App. 604a-605a, 608a-609a, 2066a-2067a. The second heroin transaction was completed on February 20, 1984. Both Spatola and Antonio were present at the sale.

Erasmo Gambino's principal contention on appeal alleges reversible error in the district court's decision to proceed with an eleven person jury.

Rosario Gambino

Rosario Gambino was first implicated in the heroin conspiracy on January 17, 1984 when Anthony

Spatola and Antonio Gambino were desperately seeking heroin to sell to Agent Glass the following day. On that day Spatola and Giovanni Bosco met at the Caffe Milano in Brooklyn at approximately 2:27 p.m. App. 2091a-2094a, 2109a-2110a. Approximately thirteen minutes later, a yellow Mercedes Benz bearing New Jersey registration 228-VIF was observed leaving the curb in front of Caffe Milano. App. 2080a. Although the residence and insurance policy listed on the registration were false, App. 2471a-2472a, 2571a-2573a, during the course of the investigation the automobile was frequently observed at the residence or in the use of Rosario Gambino. App. 2215a-2216a, 2473a.

In an intercepted phone conversation later that day, Anthony Spatola conveyed to Antonio Gambino that he had talked to his cousin,[4] the "short guy," who indicated that he would try to get the "car." App. 318a-319a. About an hour later, Spatola again talked to Antonio, this time to confirm that the "short guy" would produce one half of the heroin immediately as a favor to Spatola. App. 321a. In yet another phone conversation, between Spatola and Antonio, Spatola indicated that the heroin would arrive at the Caffe Milano between eleven and eleven-thirty that evening. App. 968a-972a. At approximately 11:19 p.m., the yellow Mercedes was again observed at the Caffe Milano, and at 11:29 p.m., it was observed departing. App. 2237a-2238a.

Spatola and Bosco left the Caffe Milano at 1:10 a.m. on January 18, 1984, and drove to Caesar's Boardwalk Regency Hotel in Atlantic City where the drug transaction was completed. App. 349a-438a, 2239a-2240a. Spatola, Bosco and Antonio Gambino

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4. Rosario Gambino and Anthony Spatola are cousins. App. 4608a.

rented Room 311 at Caesar's to use during the drug transaction. At approximately 8:20 a.m., shortly before Spatola, Bosco and Antonio checked out of the hotel, a call was placed from Room 311 to the residence of Rosario Gambino. App. 2047a-2051a. Upon leaving the hotel, Spatola, Bosco and Antonio drove directly to Rosario Gambino's residence in Cherry Hill, New Jersey, arriving there at approximately 9:30 a.m. App. 2475a. Parked outside of Rosario's residence when the trio arrived was the yellow Mercedes Benz, New Jersey registration number 228-VIF. App. 2579a. The three men left Rosario's home at about 10:40 a.m. App. 2502a.

Pursuant to ongoing heroin negotiations, Agent Glass communicated with Antonio Gambino several times after the January 18 transaction to determine whether future sales would occur. These negotiations were complicated by highly publicized heroin arrests which took place in Philadelphia on January 26, 1984. During a meeting with Spatola and Antonio Gambino on January 27, Agent Glass showed them a Philadelphia Daily News article in which the arrests were discussed. App. 1161a. There were many similarities between the ongoing heroin negotiations and the ones which had taken place in Philadelphia, including complaints about dilution of the heroin. App. 1162a-1168a. Consequently, Agent Glass encountered some difficulty in making arrangements for the second purchase. App. 515a-579a.

On January 30, 1984 a number of phone calls either directly involving Rosario Gambino or making reference to him through code names such as "Saruzzo" and "the short one," were intercepted by FBI wiretap. App. 586a-592a. Those conversations revealed ongoing efforts to schedule a second sale of heroin to Agent Glass. Eventually an agreement was reached to conduct the next sale on February 2, 1984. App. 594a.

The planned transaction was aborted, however, due to the continuing apprehensiveness of Antonio's suppliers in the wake of the Philadelphia arrests. App. 1242a.

Finally, on February 20, 1984, the second transaction was completed. Agent Glass and another undercover agent purchased a second half kilogram of heroin from Antonio and Spatola for $120,000. App. 622a-669a, 1352a. Copies of the bills used to purchase the heroin were made and maintained. App. 1352a. On March 16, 1984 Rosario Gambino was arrested and a search of his residence conducted. Two of the $100 bills used to purchase the heroin were seized from Rosario Gambino's master bedroom. App. 3421a-3422a, 4035a, 4130a.

On appeal, Rosario Gambino alleges that his sixth amendment right to effective assistance of counsel was violated because his trial lawyer's performance was adversely affected by a conflict of interest.

III.

ENTRAPMENT

In this circuit, to be entitled to an entrapment charge, a defendant must first present evidence both that the government initiated the crime, regardless of the amount of pressure applied, and that the defendant was otherwise not predisposed to commit the crime. *See United States v. Jannotti*, 729 F.2d 213, 224 (3d Cir. 1984) (*Jannotti II*)(citing *United States v. Watson*, 489 F.2d 504, 509 (3d Cir. 1973)). In the instant case, appellant Antonio Gambino demanded an entrapment charge based on evidence that (a) Special Agent Glass initiated the topic of heroin sales during negotiations for a cocaine purchase, and (b) there were several instances in their initial meeting where Antonio expressed hesitancy to arrange the heroin sale, and later where his lack of knowledge

about the heroin business was revealed to the Agent Glass. App. 4943a-4944a. Accordingly, the trial judge submitted the issue of entrapment to the jury pursuant to a jury charge which is not challenged on this appeal. App. 5876a-5878a. The jury rejected the defense of entrapment and returned a verdict of guilty against Antonio Gambino on ten of the twelve counts with which he was charged.[5] Antonio Gambino argues on appeal that his convictions nevertheless should be reversed because he was entrapped as a matter of law. We disagree.

Although appellant Antonio Gambino met the threshold evidentiary requirements entitling him to an entrapment instruction, we are unconvinced on this record that he is entitled to have his defense sustained as a matter of law. Where the evidence is undisputed that the defendant had no predisposition to commit the crimes with which he is charged, and was induced to do so only by the trickery, persuasion or fraud of the government, entrapment is established as a matter of law. *See United States v. Kaminski*, 703 F.2d 1004, 1007 (7th Cir. 1983). *See also Sherman v. United States*, 356 U.S. 369, 372 (1958)("Entrapment occurs only when the criminal conduct was 'the product of the *creative* activity' of law-enforcement officials); *United States v. Jannotti*, 673 F.2d 578, 597 (3d Cir.)(en banc), *cert. denied*, 102 S. Ct. 2906 (1982) (*Jannotti I*) ("Entrapment occurs when a defendant who was not predisposed to commit the crime does so as a result of the government's inducement"). In general, however,

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5. The only two counts upon which Antonio was acquitted were counts 6 and 9 in which he was charged along with Mario Gambino with using the telephone to facilitate a conspiracy to distribute heroin. These were the only telephone counts with which Mario Gambino was charged and he was acquitted of all charges.

entrapment is a jury question, *see United States v. Bocra*, 623 F.2d 281, 289 (3d Cir.), *cert. denied*, 449 U.S. 875 (1980), and "[t]he ultimate factual decisions . . . must be left to the jury." *Jannotti I*, 673 F.2d at 606.

To establish his claim of entrapment as a matter of law, Antonio Gambino first argues that Special Agent Glass induced him to sell heroin. However, even if the agent is presumed to have induced the sale by his initial inquiry and subsequent expressions of interest, government inducement alone does not establish entrapment as a matter of law. Rather, the key consideration upon review is whether the undisputed evidence shows a lack of predisposition on the part of the accused. *Hampton v. United States*, 425 U.S. 484, 488 (1976); *United States v. Russell*, 411 U.S. 423, 436 (1973). Evidence concerning predisposition is not undisputed if the determination depends upon the credibility of witnesses or the interpretation of the evidence. *See United States v. Pennell*, 737 F.2d 521, 534 (6th Cir. 1984), *cert. denied*, 105 S. Ct. 906 (1985); *Bocra*, 623 F.2d at 289; *United States v. Spain*, 536 F.2d 170, 173-74 (7th Cir.), *cert. denied*, 429 U.S. 833 (1976).

Appellant presents two arguments alleging that the undisputed evidence demonstrates his lack of predisposition to engage in the criminal conduct for which he was convicted. First, Antonio Gambino argues that government evidence regarding his involvement in cocaine trafficking established predisposition to sell only cocaine, not heroin. In support of his position, however, appellant can point only to the eloquent dictum of Mr. Justice Frankfurter in *Sherman*: "No matter what the defendant's past record and present inclinations to criminality, or the depths to which he has sunk in the estimation of society, certain police conduct to ensnare him into

further crime is not to be tolerated by an advanced society." 356 U.S. at 382-83 (Frankfurter, J. concurring in result). In so doing, however, appellant merely attempts to shift the focus away from his own behavior by rehashing the proposition that has been considered and rejected several times by the United States Supreme Court, *viz.* whether excessive governmental conduct, if proved, in itself negates evidence of predisposition, or, put otherwise, whether the entrapment defense should be defined in terms of the government's conduct rather than the defendant's state of mind. *See Hampton v. United States*, 425 U.S. 484, 495 - 99 (1976) (Brennan, J. dissenting); *United States v. Russell*, 411 U.S. 423, 437 - 39, 439 - 43 (1973) (Douglas, J. dissenting) (Stewart, J. dissenting); *Sherman v. United States*, 356 U.S. 369, 378-83 (1952) (Frankfurter, J. concurring in result); *Sorrells v. United States*, 287 U.S. 435, 458 - 59 (1932) (Roberts, J. dissenting).[6] While we recognize that

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6. In United States v. Russell, the majority opinion conceded that there "may some day be . . . a situation in which the conduct of the law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction." 411 U.S. at 431-32. Subsequently, this court accorded recognition to this principle in United States v. Twigg, 588 F.2d 373 (3d Cir. 1978), holding on its facts that the "nature and extent of police involvement . . . was so overreaching as to bar prosecution of the defendants as a matter of due process of law." 588 F.2d at 377.

Antonio Gambino separately alleges a due process violation and implores this Court to overturn his conviction even if we find sufficient evidence on the issue of predisposition. Despite the holding in *Twigg*, this court and other appellate courts have since exercised extreme caution in finding due process violations in undercover settings. *See e.g.*, United States v. Beverly, 723 F.2d 11, 12-13 (3d Cir. 1983); United States v. Alexandro, 675 F.2d 34, 40-41 (2d

government inducement is not wholly irrelevant to the determination of defendant's predisposition, *see Watson*, 489 F.2d at 511 ("the stronger the inducement, the more likely that any resulting criminal conduct of the defendant was due to the inducement rather than to the defendant's own predisposition"), in ascertaining predisposition we focus on 'the defendant's state of mind and inclinations *before his initial exposure to government agents.*' *United States v. Kaminski*, 703 F.2d 1004, 1008 (7th Cir. 1983) (quoting *United States v. Jannotti*, 501 F. Supp. 1182, 1191 (E.D. Pa. 1980), *rev'd on other grounds*, 673 F.2d 578 (3rd Cir.) (en banc), *cert. denied*, 457 U.S. 1106 (1982) (emphasis added)).

An appellate court reviewing a record in an effort to divine a defendant's predisposition to commit a crime must examine a variety of factors. The second circuit has enumerated three categories of evidence from which the government may discharge its burden of proof on the issue of predisposition: "the Government may prove propensity by showing (1) an existing course of criminal conduct similar to the crime for which the defendant is charged, (2) an already formed design on the part of the accused to commit the crime for which he is charged, or (3) a willingness to commit the crime for which he is charged as evidenced by the accused's

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Cir.), *cert. denied*, 103 S. Ct. 78 (1982); *Jannotti I*, 673 F.2d at 607-608. Thus, "a successful due process defense must be predicated on intolerable government conduct," and an appellate court should "exercise scrupulous restraint before . . . denounc[ing] law enforcement conduct as constitutionally unacceptable." *Jannotti I*, 673 F.2d at 607. On the facts before us, we do not find the type of egregious government misconduct that is repugnant to the concept of fundamental fairness. Accordingly, we reject Antonio's due process argument.

ready response to the inducement." *United States v. Viviano*, 437 F.2d 295, 299 (2d Cir.), *cert. denied*, 402 U.S. 983 (1971).[7] Evidence of Antonio Gambino's ongoing involvement in cocaine trafficking is clearly subsumed by the category of evidence noted in item one. Nevertheless, appellant submits that evidence of such involvement cannot provide the basis for a determination that he was predisposed to engage in similar activity where the government agent conceded that his "primary goal" was to induce appellant to engage in the sale of heroin.

Other courts, however, although focusing on problems of admissibility, have recognized the probative value of similar acts evidence on the issue of a defendant's predisposition to commit comparable crimes where a defense of entrapment was raised. *See e.g., United States v. Segovia*, 576 F.2d 251, 252-53 (9th Cir. 1978) ("the probative value of appellant's willingness to arrange for a sale of a significant quantity of marijuana in the context of his entrapment defense in a trial for similar activities involving cocaine cannot be disputed"); *see also United States v. Williams*, 705 F.2d 603, 623 (2nd Cir. 1983) (in ABSCAM prosecution evidence of conduct 'morally indistinquishable' from offense charged was probative of defendant's willingness to engage in similar activity); *cf. United States v. Murzyn*, 631 F.2d 525, 528 - 29 (7th Cir. 1980) (discussing the appropriate and reasonable restraints on the use of character evidence to prove disposition). The dictum quoted in *Segovia* is particularly apropos:

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7. We cite *Viviano* solely to illustrate the types of evidence which may support a finding of predisposition. Nothing in our reliance on *Viviano* effects this court's rejection of the bifurcated entrapment charge, *see Jannotti II*, 729 F.2d at 224, embraced in that opinion.

> "Merely because the drugs involved are different does not strip this conduct of its evidentiary value. The past acts of negotiation leading to the distribution of one drug is [are] relevant to show knowledge, motive and intent on the part of appellant to partake in the attempt here to import commercial quantities of yet another drug for purposes of distribution. The relevant factor is the type of activity undertaken, not the identity of the drugs."

Segovia, 576 F.2d at 252 (quoting *United States v. Batts*, 573 F.2d 599, 603 (9th Cir. 1978)). That the determination of the weight of the evidence and inferences to be drawn therefrom is exclusively within the province of the jury is a vital linchpin of our criminal justice system. We think that the issue whether appellant's involvement in the heroin transactions for which he was convicted was solely a result of government inducement or rather, the result of a predisposed criminal mind as evidenced by his prior cocaine dealings, was properly left to the jury.

Nor do we find any persuasive force in Antonio Gambino's suggestion that, viewed independently of government inducement, evidence of his prior involvement with cocaine was insufficient to establish predisposition. Indeed, we need not reach the issue whether, standing alone, evidence of prior similar activity is sufficient proof of predisposition, for there is ample additional evidence on this record from which predisposition may be inferred.[8]

The record reflects, despite appellant's contention to the contrary, that the government also produced

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8. Antonio Gambino argues that "[t]he only evidence of predisposition on the part of appellant rests upon the allegation that he had previously sold cocaine." Brief for Appellant Antonio Gambino at 7.

evidence that Antonio exhibited a willingness to enter into the heroin transactions. Relying on *United States v. McLernon*, 746 F.2d 1098 (6th Cir. 1984), Antonio Gambino argues that his initial reluctance to engage in heroin sales was only overcome after repeated inducements by Agent Glass. We do not find Gambino's argument convincing. The facts of *McLernon* are clearly distinguishable from those presented in this case. *McLernon* involved a situation whereby a government agent over a period of years became the accused's "blood-brother," and preyed upon that relationship by convincing the accused that the agent would be murdered if the accused did not aid in negotiating a cocaine deal. *McLernon*, 746 F.2d at 1113. We conclude that the evidence with regard to Antonio's willingness to sell heroin and the sundry interpretations urged by the parties were properly before the jury for resolution. On review, our task is to determine whether, viewing the evidence in the light most favorable to the government, there was sufficient evidence for a rational jury to find that the defendant was predisposed. *Burks v. United States*, 437 U.S. 1, 16 (1978); *Jannotti I*, 673 F.2d at 598. After a thorough examination of the record before us, we do not find that the jury was unreasonable in concluding beyond a reasonable doubt that Antonio Gambino was predisposed to engage in heroin trafficking. Accordingly, the jury's determination will not be disturbed.

IV.

RULE 23(b) AND THE ELEVEN-PERSON JURY

Appellants Erasmo Gambino and Anthony Spatola both contend that the district court committed reversible error when, after excusing a juror for cause after jury deliberations had commenced, the court

permitted a verdict to be returned by an eleven-person panel over the objection of all of the defendants.[9] Appellants concede that they have no constitutional right to a twelve-person jury, *see Williams v. Florida*, 399 U.S. 78, 103 (1970), but insist that where alternate jurors are available, albeit in contravention of Federal Rule of Criminal Procedure 24(c)[10], defendants are entitled, at a minimum, to a determination whether the jury could begin its deliberations anew upon the substitution of a properly sequestered alternate. Absent a finding of potential prejudice to the parties, appellants argue that the preference of the defendants -- in this case juror-substitution -- should be honored.

The events precipitating this challenge are as follows:[11]

At the time that the jury retired to begin deliberations, Judge Lacey decided to retain two alternate jurors in sequestration. App. 5903a-5909a. After over twenty hours of deliberation, the jury notified the court through their foreman that three documents, not marked into evidence, had been discovered in the exhibit box. The court immediately marked the note from the jury and the three documents as Court Exhibits C-22, (a), (b), and (c), respectively, and promptly conducted an inquiry into

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9. Each appellant has invoked Rule 28(i) of the Federal Rules of Appellate Procedure, joining the arguments of their co-appellants insofar as those arguments are applicable to them and not inconsistent with the arguments in their briefs. Presumably, all appellants join in this argument.

10. *See infra* note 13.

11. A more detailed account of these facts is found in Judge Lacey's opinion in United States v. Gambino, 598 F. Supp. 646, 658-60 (D.N.J. 1984).

the matter with counsel and in the presence of all of the defendants.

Upon questioning the jury panel, the court determined that only jurors four and five had seen any of the unauthorized documents. Neither juror had discussed what they had viewed with the other members of the panel. Only one of the two, juror number five, had viewed a document that the court and counsel considered potentially prejudicial. As a result, at the conclusion of the hearing all defense counsel joined in a motion to remove juror number five and substitute him with one of the two alternates the court had retained at the time the jury retired. The government did not oppose this request. Notwithstanding the desires of defense attorneys to return the jury to its full complement of twelve, the court found just cause to remove juror number five but refused to replace him with the first alternate, noting instead that Rule 23(b) compelled him to proceed with an eleven person jury. At that juncture the court discharged the two alternate jurors. Later that day, the remaining 11 jurors rendered a verdict.

Rule 23(b)[12] of the Federal Rules of Criminal Procedure authorizes the trial court, in its discretion,

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12. Rule 23(b) provides:

> (b) **Jury of Less Than Twelve.** Juries shall be of 12 but at any time before verdict the parties may stipulate in writing with the approval of the court that the jury shall consist of any number less than 12 or that a valid verdict may be returned by a jury of less than 12 should the court find it necessary to excuse one or more jurors for any just cause after trial commences. Even absent such stipulation, if the court finds it necessary to excuse a juror for just cause after the jury has retired to consider its verdict, in the discretion of the court a valid verdict may be returned by the remaining 11 jurors.
>
> Fed. R. Crim. Pro. 23(b).

to proceed with a jury of eleven in the event a juror is excused for cause after the jury has retired to consider its verdict. Appellants argue nonetheless that Judge Lacey misinterpreted Rule 23(b) as precluding the option of substituting an available alternate for the excused juror.[13]

Thus, appellants do not challenge the district court's discretion to proceed with an eleven-person jury; rather, they charge that that discretion was supplanted by Judge Lacey's implementation of what he erroneously believed to be the sole mandate of Rule 23(b). We simply find no merit to appellants' contention.

Prior to August 1, 1983, Rule 23(b) required the stipulation of counsel in order to proceed with an eleven-person jury. Meanwhile, Federal Rule of Criminal Procedure 24(c)[14] required that all alternate jurors be excused at the time the case was submitted to

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13. Rule 23(b) makes no provision for the substitution of alternate jurors. Juror substitution is authorized and governed by the provision of Rule 24(c) of the Federal Rules of Criminal Procedure which provides in pertinent part:

> (c) **Alternate Jurors.** The court may direct that not more than 6 jurors in addition to the regular jury to be called and impaneled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become or are found to be unable or disqualified to perform their duties. . . . An alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict.

Fed. R. Crim. Pro. 24(c). Although 24(c) requires that alternate jurors be discharged once the jury retires for deliberations, Judge Lacey had retained and sequestered two alternates who remained available at the time the disqualified juror was dismissed. *See* discussion *infra*.

14. *See supra* note 13.

the jury for deliberation. Thus, the interaction between Rules 23(b) and 24(c) enabled defendants to force a mistrial if a juror became incapacitated during deliberations, for absent stipulation the court could not proceed with a jury of eleven and post-submission substitution was barred by 24(c). As a result, particularly after lengthy trials, some judges took the precaution of retaining alternates, in clear violation of 24(c), in order to avoid mistrial if counsel refused to proceed with a jury of eleven after a juror became incapacitated during deliberations. Appellate courts reviewing this problem invariably held that a departure from the plain language of Rule 24(c) would not automatically constitute reversible error; rather, the verdict would be sustained absent a showing of prejudice to defendant. *See, e.g., United States v. Hillard*, 701 F.2d 1052, 1058 (2d Cir.), *cert denied*, 461 U.S. 958 (1983); *United States v. Kopituk*, 690 F.2d 1289, 1309 - 11 (11th Cir. 1982), *cert. denied sub. nom., Turner v. United States*, 461 U.S. 928 (1983); *United States v. Phillips*, 664 F.2d 971, 994 - 96 (5th Cir. 1981), *cert. denied sub. nom., Meinster v. United States*, 457 U.S. 1136 (1982). In so doing, however, these courts refused to endorse violations of Rule 24(c) as a matter of course. The Eleventh Circuit in *Kopituk, supra*, noted:

> It is not our intention, nor is it within our province, to authorize routine deviation from the terms of Rule 24(c). That rule is 'the rule' and the substituted juror procedure upheld herein is a narrowly limited exception to the rule, applicable only in extraordinary situations and, even then, only when extraordinary precautions are taken . . . to ensure that the defendants are not prejudiced.

Kopituk, 690 F.2d at 1311.

We begin our analysis of procedures employed by Judge Lacey, then, with the observation that the initial

decision by the district court to retain and sequester two alternate jurors once the case had been submitted to the jury was a clear violation of Rule 24(c). *Accord Phillips*, 664 F.2d at 994. The unique position advanced on this appeal, however, does not allege error in the violation of Rule 24(c). Instead, appellants, in effect, challenge the failure of the district judge to violate (or at a minimum, seriously consider violating) the rule *in toto*. Appellants' proposition is absurd.

When the Advisory Committee on the Federal Rules of Criminal Procedure studied the interaction between Rules 23(b) and 24(c) and, specifically, the stumbling block imposed by the stipulation requirement, it explicitly rejected the proposed solution of amending Rule 24(c) to permit substitution.[15] The Committee's aversion to the juror-substitution option is beyond doubt. The Committee noted:

> There have been proposals that the rule should be amended to permit an alternate to be substituted if a regular juror becomes unable to perform his duties after the case has been submitted to the jury. An early draft of the original Criminal Rules had contained such a provision, but it was withdrawn when the Supreme Court itself indicated to the Advisory Committee on the Criminal Rules doubts as to the desirability and constitutionality of such a procedure. These doubts are as forceful now as they were a quarter century ago. To permit substitution of an alternate after deliberations have begun would require either that the alternate participate though he has missed part of the jury discussion, or that he sit in

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15. For a review of the rejected proposed rule permitting juror substitution following the commencement of jury deliberations, see Preliminary Draft of Proposed Amendments to the Federal Rules of Criminal Procedure, 91 F.R.D. 289, 341-45 (1981).

> with the jury in every case on the chance he might be needed. Either course is subject to practical difficulty and to strong constitutional objection.

Advisory Committee Note, 97 F.R.D. 245, 300 (1983) (quoting Wright, Federal Practice and Procedure § 388 (1969)). Instead, the Committee concluded that the better alternative was to amend 23(b) to permit the judge, on his own motion, to proceed with a jury of eleven. The amendment was thus designed to avert the dilemma posed by the very cases on which appellants now rely, *e.g.*, *Phillips*, *supra*.

Although the primary objective of the amendment to Rule 23(b) is to provide judges with an alternative to mistrial after a juror is excused for cause, the amendment also contemplates compliance with Rule 24(c). Because the amendment does not allow the court, on its own motion, to proceed with a panel of *less* than eleven, however, Judge Lacey retained the two alternates as a precaution were he later confronted with the necessity of excusing two jurors for cause.[16] *See United States v. Gambino*, 598 F.Supp. 646, 660 (D.N.J. 1984). That potentiality never materialized and, therefore, Judge Lacey was not forced to journey into unknown territory. He was instead faced with a set of circumstances for which a solution had been devised, *viz.* Rule 23(b), a solution which appellants

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16. Judge Lacey's action in anticipation of the dismissal of two jurors is not challenged before this court. Accordingly, we express no opinion as to the propriety or desirability of such action. We note, however, that Judge Lacey's apprehensions were not unfounded. Indeed, it is merely fortuitous that juror number four did not also view the document that necessitated the dismissal of juror number five, or that the document viewed by juror number four was deemed innocuous by the court and counsel. *See* United States v. Gambino, 598 F.Supp. at 658.

urge us to ignore. We refuse to do so. It is clear from the record that the district court did not abuse its discretion under Rule 23(b) in opting for the eleven-panel verdict. It is equally clear that under Rule 23(b) Judge Lacey did all that he was required to do. "The [Rule] provides that if a juror is excused after the jury has retired to consider its verdict, *it is within the discretion of the court whether to declare mistrial or to permit deliberations to continue with 11 jurors.*" 97 F.R.D. at 301 (emphasis added). The court was under no obligation to consider the feasibility of any other options, particularly one which was explicitly disfavored as a remedial device by the Rules Committee that studied and revised Rule 23(b).

V.

CONFLICT OF INTEREST

Rosario Gambino alleges that his sixth amendment right to effective assistance of counsel was violated because his trial lawyer's performance was adversely affected by a conflict of interest. The factual predicate of this claim rests upon the simultaneous representation of Rosario Gambino and Gaetano Mazzara by defense attorney, Jacob Evseroff. While representing Rosario at the trial level in the instant action, Mr. Evseroff had also been retained as counsel for Gaetano Mazzara in *United States v. Badalamenti, et al.*, No. 84-Cr-286, a narcotics conspiracy case pending in the United States District Court for the Southern District of New York. Documents filed in connection with the prosecution's case in *Badalamenti* indicated that Mazzara was also under suspicion as the source of the heroin sold to undercover agents by Anthony Spatola and Antonio Gambino on January 18, 1984. Rosario Gambino argues that Mr. Evseroff's dual representation created an actual conflict of interest because "for Mr. Evseroff

to demonstrate that it was not Rosario Gambino, but Mazzara, who supplied the heroin would breach his duty of loyalty to Mazzara. Thus counsel's fidelity to Rosario Gambino -- including inculpating Mazzara to exculpate Gambino -- clashed with his allegiance to Mazzara." Brief of Rosario Gambino at 24-25.

A.

A litany of cases in this circuit firmly establish our general policy against entertaining ineffective assistance of counsel claims on direct appeal, *see e.g., Government of the Virgin Islands v. George*, 741 F.2d 643, 646 (3d Cir. 1984); *United States v. Davis*, 710 F.2d 104, 110 (3d Cir. 1983); *United States v. Frankenberry*, 696 F.2d 239, 241-42 (3d Cir. 1982); *United States v. Sturm*, 671 F.2d 749, 750-51 (3d Cir. 1982) (per curiam), *cert. denied*, 103 S. Ct. 95 (1985); *United States v. Jackson*, 649 F.2d 967, 973 (3d Cir.), *cert. denied*, 454 U.S. 871, 1034 (1981); *United States v. Rad-O-Lite of Philadelphia, Inc.*, 612 F.2d 740, 743-744 (3d Cir. 1979); *United States v. Garcia*, 544 F.2d 681, 684 n.1 (3d Cir. 1976). The rationale underlying this preferred policy is that oft-times such claims involve allegations and evidence that are either absent from or not readily apparent on the record. Thus, we have maintained that the better course is for the accused to pursue his objections in an appropriate collateral proceeding, *see e.g.*, 28 U.S.C. § 2255, where the district court may compile a sufficient factual record thereby facilitating appellate review.

Recently, in *Government of the Virgin Islands v. Zepp*, 748 F.2d 125 (3d Cir. 1984), this court had occasion to carve out a narrow exception to the general rule against hearing ineffective assistance of counsel claims on direct appeal. Therein we held that "where an objection has been properly made at trial, or, where the record clearly shows actual conflict of interest and

objections made at trial did or should have put the trial court on notice that potential conflict of interest existed, this court's 'preference' for developing such issues on collateral attack need not be followed, and a full consideration of the issue is appropriate." *Zepp*, 748 F.2d at 134. In arriving at this conclusion, we observed the teachings of two contemporaneous United States Supreme Court decisions.

In *United States v. Cronic*, 104 S. Ct. 2039 (1984) and *Strickland v. Washington*, 104 S. Ct. 2052 (1984), the Supreme Court was asked to determine the proper standards for judging sixth amendment claims of ineffective assistance of counsel. Claims of ineffective assistance of counsel may be broadly categorized into two groups: (1) those claims primarily founded upon external factors,[17] and (2) those founded upon the actual conduct or misconduct of the trial lawyer. Moreover, as observed in *Strickland* and *Cronic*, claims that involve allegations of attorney misconduct may be further divided into (1) those premised on the incompetence of counsel due to specific errors or

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17. In *Cronic* the Supreme Court acknowledged ineffective assistance claims "based on actual or constructive denial of the assistance of counsel altogether, as well as claims based on state interference with the ability of counsel to render effective assistance to the accused." *Strickland*, 104 S. Ct. at 2062 (citing *Cronic*, 104 S. Ct. at 2047-48). Such claims contemplate particularly egregious circumstances such as where the defendant is denied the assistance of counsel at a critical stage of the litigation prosecution, *Cronic*, 104 S. Ct. at 2047 & n.25, or where external interference prevents even the most able lawyer from providing meaningful assistance, *see Cronic*, 104 S. Ct. 2047-48 (citing Powell v. Alabama, 287 U.S. 45 (1932)). The Court concluded that "when surrounding circumstances justify a presumption of ineffectiveness . . . a Sixth Amendment claim [may] be sufficient without inquiry into counsel's actual performance at trial." *Cronic*, 104 S. Ct. at 2048.

omissions during the course of representation, *Cronic*, 104 S. Ct. at 2046 n.20; *Strickland*, 104 S. Ct. at 2064-69; or (2) those premised on an actual conflict of interest that adversely affected counsel's performance, *Cuyler v. Sullivan*, 446 U.S. 335, 348; *Strickland*, 104 S. Ct. at 2067. Under the first type of claim, where an ineffective assistance claim alleges deficient performance by trial counsel, the Court instructed that a defendant must "affirmatively prove prejudice." *Strickland*, 104 S. Ct. at 2067. Upon addressing the burden to be borne by an accused advancing an ineffective assistance of counsel claim due to an actual conflict of interest, however, the *Strickland* Court reiterated its prior pronouncement, announced in *Cuyler v. Sullivan*, that an actual conflict of interest warrants a *presumption* of prejudice. *See Strickland*, 104 S. Ct. at 2067.

It is important to note that overemphasis on the presumption of prejudice cannot operate to obviate the requisite obligation to demonstrate the existence of an actual conflict. "Prejudice is presumed *only* if the defendant demonstrates that counsel 'actively represented conflicting interests' and 'that an actual conflict of interest adversely affected his lawyer's performance.'" *Strickland*, 104 S. Ct. at 2067 (quoting *Cuyler v. Sullivan*, 446 U.S. at 350, 348) (emphasis added). Thus, the less stringent test to obtain relief under the sixth amendment for conflicts of interest does not give rise to a less stringent standard in determining whether such claims should be resolved on direct appeal. As we stated in *Zepp*, the desirability of leaving to the district court, in the first instance, the development of an appropriate factual record, whether through an evidentiary hearing or in the course of a habeas corpus collateral proceeding, is equally applicable to claims of ineffective assistance of counsel based on a conflict of interest as to those based on trial

counsel's incompetence. *See Zepp*, 748 F.2d at 133. The critical inquiry on this direct appeal, then, is whether the record evidence demonstrates that Jacob Evseroff "actively represented conflicting interests."

B.

"Actual conflict of interest is evidenced if, during the course of representation, the defendants' interests diverge with respect to a material factual or legal issue or to a course of action. . . . This conflict must cause some lapse in representation contrary to the defendant's interests but such lapse need not rise to the level of actual prejudice." *Sullivan v. Cuyler*, 723 F.2d 1077, 1086 (3d Cir. 1983) (*Sullivan II*).

Following trial in this matter, appellant Rosario Gambino filed a Rule 33 motion for a new trial. Fed. R. Crim. Pro. 33. Relying on various statements contained in government pleadings filed in the *Badalamenti* narcotics case, Rosario Gambino argued, *inter alia*, that those "documents conclusively demonstrate that prior to Rosario Gambino's trial the government was in possession of evidence which it contended demonstrated that Spatola and Bosco obtained the heroin [for the January 18, 1984 transaction] not from Rosario Gambino but instead from Castronovo and Mazzara or through their agent, Joseph LaRosa." App. 65a. Accordingly, Rosario Gambino requested that Judge Lacey order a new trial on the ground of newly discovered evidence.[18]

Our review of the record on the Rule 33 motion reveals that, though not specifically raising a claim of

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18. Rosario Gambino alleges reversible error in the district court's denial of his motion for a new trial. After reviewing the record and the claims of appellant, we do not find that the trial judge improperly denied Gambino's motion for a new trial.

ineffective assistance of counsel, Rosario, through newly acquired counsel, twice alluded to a potential conflict of interest in memorandum filed in support of his motion.[19] First, in the course of responding to the government's position that documents and the information contained therein were not newly discovered evidence, Rosario argued that "[s]urely, the government could not expect Rosario Gambino's attorney to contend that his other client, Gaetano Mazzara, might have supplied the heroin, especially in view of the total lack of any such claim by the government at the Gambino trial." App. 84a-85a. Then, in response to the government's contention that the *Badalamenti* documents could have been discovered through due diligence of trial counsel, Rosario Gambino's memorandum again observed the potential conflict: "Surely [Mr. Evseroff] cannot be considered to be less than diligent for failing to review documents in a wholly separate case to see whether those documents might impact upon Rosario Gambino's trial. This is especially true when the

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19. We acknowledge that the positive record evidence relied on by appellant as demonstrative of an actual conflict consists exclusively of documents filed in connection with appellant's Rule 33 motion. The requirement that an objection be properly raised at trial, however, is not a rigid, mechanical rule blind to valid claims properly raised in pre- or post-trial proceedings. *See e.g., Zepp*, 748 F.2d at 134 n.9 (recognizing conflict claims raised during suppression hearing); *Cronic*, 104 S. Ct. at 2051 n.42 (acknowledging that an ineffective assistance claim properly raised and ruled on in a Rule 33 motion for a new trial may be considered on direct appeal); *cf.* American Home Assurance Co. v. Sunshine Supermarket, Inc., 753 F.2d 321, 324-25 (3d Cir. 1985) (objection when evidence of nonprosecution was introduced during hearing on motion *in limine* was not required to preserve for appeal the specific issue raised in the motion).

government did not in any way indicate to him that it knew that the case might be interrelated and that he would have a clear and unquestionable conflict of interest between his two clients, Rosario Gambino and Gaetano Mazzara." App. 86a-87a.

Upon ruling on appellant's motion for a new trial, Judge Lacey found that the information regarding Mazzara and Castronovo was contained in documents that were made public well in advance of Rosario Gambino's trial and therefore, was available to the defense in the exercise of due diligence. App. 151a. In addition, Judge Lacey expressly noted that in his capacity as attorney of record for Mazzara in the *Badalamenti* proceeding, Mr. Evseroff had actual possession of the information now labeled as newly discovered. Finally, Judge Lacey concluded that, notwithstanding any constructive notice afforded to counsel, Mr. Evseroff was actually provided with a surveillance log -- J-146 -- of the events of January 17, 1984 at the Caffe Milano during the course of the trial. The judge observed:

> This very exhibit was used carefully and deliberately by Mr. Evseroff in his cross-examination of surveillance agents. . . . J-146 contains several log entries naming and noting the observation of Gaetano Mazzara and Francesco Castronovo at the Caffe Milano, consistent of course with what is now so heavily relied upon by the defendant. While Mr. Evseroff and other defense counsel conducted extensive cross-examination of the surveillance agents, not one elected to question the agents about the activities of Gaetano Mazzara and Francesco Castronovo at the Caffe Milano on that date.

App. 151-52a.

At the onset, Rosario Gambino asserts that

multiple representation[20] is clearly established on the record by Mr. Evseroff's undertaking to simultaneously defend, albeit in separate proceedings in federal courts in New Jersey and New York, two clients accused of committing the exact same crime. He then turns to Judge Lacey's findings on the Rule 33 motion and argues that those findings constitute direct record evidence of Mr. Evseroff's conflict of interest.

In addition to his reliance on evidence emanating from the Rule 33 motion, Rosario argues that the actual conflict posed by Mr. Evseroff's dual representation is established by certain omissions noted during the course of the trial: (1) counsel's failure to shift suspicion away from his client by questioning government agents about Mazzara's involvement in the January 18 drug transaction, (2) counsel's failure to investigate and obtain additional witnesses to implicate Mazzara and exonerate Rosario, and (3) counsel's failure to vigorously suggest to the jury during summation that Mazzara was the supplier of the heroin. The failure to advance such a defense, Rosario contends, is tantamount to a serious lapse in

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20. In *Sullivan II* we noted that a conflict of interest violative of the sixth amendment is established upon proof of (1) multiple representation that, (2) creates an actual conflict of interest that (3) results in an adverse effect upon the lawyer's performance. 723 F.2d at 1084. We subsequently acknowledged in *Zepp* that "our decision [in *Sullivan II*] must not be construed so narrowly as to encompass only those factual situations where counsel simultaneously represents different defendants." 748 F.2d at 135. Thus, traditional multiple representation remains a salient, though non-essential, element of a cognizable conflict of interest claim. Rosario alleges multiple representation in the defense of two clients not defendants in the same trial. Our key consideration remains whether trial counsel "actively represented conflicting interests." *Cuyler*, 446 U.S. at 350.

representation that clearly indicates that Mr. Evseroff labored under an actual conflict of interest that adversely affected his performance. Finally, Rosario points to Mr. Evseroff's failure to alert the trial judge of counsel's dual representation of Mazzara prior to trial, or at the earliest point during trial after which the conflict became apparent, as an impermissible lapse in representation.[21] Thus, Rosario Gambino concludes

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21. In addition to the argument that Mr. Evseroff's failure to inform the district court of his dual representation is proof of actual conflict, Rosario Gambino asserts that his own ignorance of the existence and implications of Mr. Evseroff's dual representation "raises the question of whether [Rosario] even needs to demonstrate that an actual conflict of interest adversely affected counsel's performance." Brief of Rosario Gambino, at 30 n.*. Whatever the merits of this position to a substantive resolution of Rosario's claim, it has no bearing on our determination whether such substantive resolution is warranted on direct appeal. *Cf.* Briguglio v. United States, 675 F.2d 81, 82 (3d Cir. 1982) (affirming defendant's conviction without prejudice to his right to pursue claims in a collateral proceeding despite defendant's ignorance during trial of criminal investigation of his trial attorney by the same United States Attorney's Office prosecuting the case against accused).

In *Cuyler v. Sullivan* the Supreme Court acknowledged that "[d]efense counsel have an ethical obligation to avoid conflicting representations and to advise the court promptly when a conflict of interest arises during the course of trial." The Court proceeded to note, however, that "[a]bsent special circumstances, . . . *trial courts may assume either that multiple representation entails no conflict or that the lawyer and his clients knowingly accept such risk of conflict as may exist.*" 446 U.S. at 346-47 (emphasis added). We think that the highlighted segment of the *Cuyler* quote is suggestive of but a few of the possibilities on which this record is silent. Absent direct evidence, we will not assume, for the sake of addressing Rosario Gambino's sixth amendment claim, that there was

that the record before this court is adequate to review his ineffective assistance of counsel claim on direct appeal.

In response, however, the government argues that Rosario's claim reveals neither an actual conflict of interest nor one that adversely affected trial counsel's performance. Instead, the government describes the claim as one "based totally on speculation and hypothetical analysis." Having extensively reviewed and outlined the evidence on the alleged conflict of interest, we think that it is far from manifest that an actual conflict existed. While the evidence strongly indicates that there *may* have been a conflict, "a possible conflict inheres in almost every instance of multiple representation." *Cuyler*, 446 U.S. at 348. Both parties have advanced various, plausible interpretations of the trial strategy employed by Mr. Evseroff at Rosario Gambino's trial. Consequently, we cannot approach this record with the sanguinity envisioned by *Zepp*. The narrow exception enunciated in *Zepp* is tailored to fit only those exceptional situations that lend themselves to only one conclusion -- that trial counsel labored under an actual conflict of interest. Our past precedent compel us to affirm the conviction of appellant Rosario Gambino without prejudice to his ability to initiate a § 2255 collateral proceeding for the resolution of his conflict of interest claim.

VI.

SENTENCING

Appellants urge us on various prudential and constitutional grounds to vacate their sentences and

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an actual conflict, or that counsel and clients did not "knowingly accept such risk of conflict as may exist." These issues are better explored in a § 2255 proceeding.

remand for resentencing. We find no merit in those arguments. Thus, absent a procedural defect or a clear abuse of discretion, we will not interfere with a sentence imposed within the statutory limits afforded to the trial judge. *See United States v. Matthews*, 773 F.2d 48, 52 (3d Cir. 1985). We find evidence of neither. Accordingly, the sentences imposed by the district court shall be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

(A.O. U.S. Courts. G.M.C. Printing, Phila., Pa. 215-568-4264)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 88-5232

UNITED STATES OF AMERICA

VS.

GAMBINO, ROSARIO, Appellant

(D.C. Crim. No. 84-00098-01 sec. 2255)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Present: SLOVITER, MANSMANN and GREENBERG, Circuit Judges

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel October 6, 1988.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, entered March 14, 1988, be, and the same is hereby affirmed. All of the above in

accordance with the opinion of this Court.

ATTEST:

S/ Sally Mrvos

Clerk

December 30, 1988

Certified as a true copy and issued in lieu of a formal mandate on February 8, 1989.

Test: S/ M. Elizabeth Ferguson

Chief Deputy Clerk, United States Court of Appeals, for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 88-5232

UNITED STATES OF AMERICA

VS.

GAMBINO, ROSARIO, Appellant

(D.C. Crim. No. 84-00098-01 sec. 2255)

ON PETITION FOR REHEARING

BEFORE: SEITZ, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA and NYGAARD, Circuit Judges

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having

voted for rehearing, the petition for rehearing by the panel and the Court in banc, is denied. For the reasons noted in Judge Mansmann's dissent, Judge Higginbotham and Judge Mansmann vote for in banc consideration. Judge Becker would grant rehearing by the court in banc.

BY THE COURT,

S/ Morton I. Greenberg

CIRCUIT JUDGE

Dated: JAN 31, 1989

Supreme Court, U.S.
FILED
JUN 2 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1621

In the Supreme Court of the United States

OCTOBER TERM, 1988

ROSARIO GAMBINO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's counsel had a conflict of interest that adversely affected petitioner's defense at trial.

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No. 88-1621

ROSARIO GAMBINO, PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-45) is reported at 864 F.2d 1064, and the opinion of the district court (Pet. Supp. App. 46-62) is unreported. The opinion of the court of appeals on petitioner's direct appeal of his conviction (Pet. Supp. App. 63-98) is reported at 788 F.2d 938.

JURISDICTION

The judgment of the court of appeals was entered on December 30, 1988, and a petition for rehearing was denied on January 31, 1989. The petition for a writ of certiorari was filed on March 31, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of New Jersey, petitioner was convicted of conspiracy to distribute heroin, in violation of 21 U.S.C. 846; two counts of possession of heroin with intent to distribute it, in violation of 21 U.S.C. 841(a)(1); two counts of distribution of heroin, in violation of 21 U.S.C. 841(a)(1); and one count of using a telephone to facilitate a conspiracy to distribute heroin, in violation of 21 U.S.C. 843. Petitioner was sentenced to an aggregate term of 45 years' imprisonment, a 20-year special parole term, and a $105,000 fine. The court of appeals affirmed (Pet. App. 2-3; Pet. Supp. App. 63-98). Petitioner then filed a motion for relief under 28 U.S.C. 2255. After a hearing, the district court denied the motion (Pet. Supp. App. 46-62i), and the court of appeals affirmed (Pet. App. 1-45).

1. Petitioner's conflict-of-interest claim in this case relates solely to his conviction on Counts 11 and 12 of the indictment, which charged him with possession of heroin with intent to distribute it and distribution of heroin in connection with a sale to an undercover FBI agent in Atlantic City on January 18, 1984. Pet. App. 2-3.[1] The evidence at trial concerning that transaction is set forth in the opinion of the court of appeals on petitioner's direct

[1] Petitioner does not allege that his attorney had a conflict of interest regarding any of the other counts on which he was convicted. Those counts charged petitioner with possession with intent to distribute heroin and distribution of heroin at Somers Point, New Jersey, on or about February 20, 1984 (Counts 17 and 18); conspiracy to distribute heroin from at least as early as October 1, 1983, until on or about March 16, 1984 (Count 2); and use of a telephone at Cape May, New Jersey, on or about January 30, 1984, to facilitate the distribution of heroin (Count 13). Pet. App. 2-3. Petitioner was acquitted on a count charging that he engaged in a continuing criminal enterprise, in violation of 21 U.S.C. 848 (1982 & Supp. V 1987). Pet. Supp. App. 62e.

appeal (Pet. Supp. App. 71-74) and in the government's brief on appeal from the district court's denial of petitioner's motion under Section 2255. It showed that on January 17, 1984, two of petitioner's co-defendants, Anthony Spatola and Antonio Gambino, were trying to obtain heroin to sell to the undercover agent the next day. Spatola, who is petitioner's cousin, and Giovanni Bosco, another co-conspirator who was a fugitive at the time of trial, met at the Caffe Milano in Brooklyn at approximately 2:27 p.m. on January 17, apparently to discuss the proposed sale. Thirteen minutes later, a yellow Mercedes Benz usually driven by petitioner was seen leaving the curb in front of the Caffe Milano. Shortly thereafter, in a recorded conversation, Spatola told Antonio Gambino that he had talked with petitioner, who in turn had left to see if he could obtain heroin. In a subsequent recorded conversation, Spatola confirmed to Antonio Gambino that as a favor, petitioner could obtain half of the heroin they needed. That information was relayed by Antonio Gambino to the undercover FBI agent. In each of the conversations, petitioner's co-conspirators referred to petitioner as "the short guy." Pet. App. 3, 71-72; Gov't C.A. Br. 8-9.

Later on January 17, Spatola told Antonio Gambino that the heroin would arrive at the Caffe Milano between 11:00 and 11:30 that night. At 11:19, petitioner's yellow Mercedes Benz arrived at the Caffe Milano, and at 11:29, it departed. During a recorded conversation early the next morning, Spatola told Antonio Gambino that "Sarino"—another nickname for petitioner—was not making any money on this deal because he had to obtain the heroin elsewhere and was providing it as a favor. A few hours later, Spatola and Bosco sold the heroin to undercover FBI agents in a hotel room in Atlantic City. After leaving the hotel, Spatola, Bosco, and Antonio Gambino drove to

petitioner's home, where the Mercedes Benz was parked. Pet. Supp. App. 72-73; Gov't C.A. Br. 10-11.

During negotiations to arrange a second purchase of heroin from petitioner and his co-conspirators, a number of telephone calls were made to petitioner, and in other recorded conversations the parties referred to petitioner by his code names. After the second sale, petitioner's home was searched. Two of the bills used by the FBI to make the second purchase were found in petitioner's home. Pet. Supp. App. 73-74; Gov't C.A. Br. 11-14.

2. Following his conviction, and while his appeal was pending, petitioner filed a motion for a new trial under Fed. R. Crim. P. 33 based on newly discovered evidence. In support of the motion, petitioner produced, *inter alia,* documents from *United States* v. *Badalamenti,* No. 84-Cr-286, a large-scale narcotics prosecution in the Southern District of New York, as well as surveillance logs furnished to defense counsel at petitioner's trial and in the *Badalamenti* case (Pet. Supp. App. 92-94). The surveillance logs showed that Gaetano Mazzara, a defendant in *Badalamenti,* had been present at the Caffe Milano on January 17, 1984, the same day that Spatola, Bosco, and Antonio Gambino obtained the heroin there. Specifically, the logs showed that Mazzara arrived at 2:58 p.m., entered the Caffe Milano at 3:00 p.m., entered a nearby tile store at 3:09 p.m., and left the scene at 3:41 p.m. (Pet. App. 5). The documents in the *Badalamenti* case also suggested that the government had at one time suspected that Mazzara was the source of the heroin that was delivered to Spatola, Bosco, and Gambino on that date (*id.* at 9; Pet. Supp. App. 88).

The district court denied petitioner's motion for a new trial (C.A. App. A674-A683). The court first held that the evidence was not "newly discovered," because it was available to the defense in the exercise of due diligence (*id.* at A675-A678). But the court further concluded that the evi-

dence did not in any event furnish a basis for relief under Rule 33. Of particular relevance here, petitioner relied on a footnote in the government's memorandum concerning a severance motion in *Badalamenti* stating that "Castronovo [a Mazzara associate] and Mazzara arranged for the delivery of heroin to a *Gambino* representative at the Caffe Milano" on January 17, 1984; the court observed that "[petitioner's] argument that this conclusory statement is somehow exculpatory (notwithstanding the reference to Gambino) rests largely upon a contention that the statement contradicts the government's version of the offense which portrayed [petitioner] as the supplier of the heroin sold" (*id.* at A680-A681). The court noted, however, that the evidence at trial showed that the defendants were unable to obtain heroin from their usual source on January 17, 1984, and that they had obtained the heroin from someone else as a favor (*id.* at A681). Against this background, the district court concluded that "the cited footnote from the *Badalamenti* severance memorandum not only is not impeachment material; it now identifies Castronovo and Mazzara as the persons from whom [petitioner] obtained the heroin for the January 17 sale" (*ibid.*). Furthermore, in the court's view, "[t]he evidence implicating [petitioner] was so clear and striking * * * that strong evidence indeed would be required to turn the tide" and warrant the granting of a new trial (*id.* at A682).

3. On the direct appeal of his conviction, petitioner relied on the evidence submitted in the Rule 33 proceedings to argue that his attorney, Jacob Evseroff, had a conflict of interest because he represented Mazzara in the *Badalamenti* case.[2] Petitioner contended that Evseroff had an actual conflict of interest that adversely affected

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[2] The court of appeals affirmed the district court's denial of the Rule 33 motion (Pet. Supp. App. 92 n.18).

his performance because Evseroff did not present the defense that it was Mazzara, rather than petitioner, who was the source of the heroin that was the subject of Counts 11 and 12 of the indictment (Pet. Supp. App. 94-97). The court of appeals declined to resolve that issue because of its general rule that conflict-of-interest claims are not cognizable on direct appeal (*id.* at 88-97). In the court's view, this case did not fall within the limited exception to that rule announced in *Government of the Virgin Islands* v. *Zepp,* 748 F.2d 125 (3d Cir. 1984), which allows consideration of such claims on direct appeal " 'where the record clearly shows actual conflict of interest and objections made at trial did or should have put the trial court on notice that potential conflict of interest existed' " (Pet. Supp. App. 89-90, quoting *Zepp,* 748 F.2d at 134). Applying that standard, the court found that although petitioner's showing suggested that attorney Evseroff had a potential conflict of interest, the record did not show an actual conflict, since "[b]oth parties have advanced various, plausible interpretations of the trial strategy employed by Mr. Evseroff at [petitioner's] trial" (Pet. Supp. App. 97). The court therefore affirmed petitioner's conviction without prejudice to his right to raise the conflict-of-interest claim in collateral proceedings under 28 U.S.C. 2255 (Pet. Supp. App. 97).

4. a. Petitioner then filed a motion under 28 U.S.C. 2255, again alleging that his attorney had an actual conflict of interest that adversely affected his performance. In support of that motion, petitioner relied on the government's surveillance logs showing that Mazzara was at the Caffe Milano for approximately 45 minutes on the afternoon of January 17. Petitioner also submitted an affidavit signed by Evseroff stating that although he was aware that there was a "substantial argument" that Mazzara was the source of the heroin sold to the undercover agents in Atlantic City on January 18, 1984, he had carefully

avoided questioning the agents who had conducted surveillance of the Caffe Milano on January 17 out of a sense of loyalty to Mazzara and for fear that he might jeopardize Mazzara's position at his impending trial in the *Badalamenti* case. The affidavit also stated that Evseroff had not called petitioner's attention to the possible argument that Mazzara was the source of the heroin. Pet. App. 4-5; Pet. Supp. App. 52-53.

Evseroff's testimony at the hearing on petitioner's motion under 28 U.S.C. 2255 differed from the statements in the affidavit. Thus, Evseroff testified that he had not cross-examined the surveillance agents about Mazzara's presence or sought additional information about Mazzara's involvement in the episode because it would have been a "specious argument" to contend that Mazzara was the source of the heroin (Pet. App. 5-6). Evseroff also stated that while there was evidence suggesting that Mazzara was the source of the heroin, it was not sufficient to make a "substantial argument" to that effect (*id.* at 6), because the only information he had at the time was that Mazzara had been at the Caffe Milano eight hours before the delivery took place (*id.* at 7). By the same token, Evseroff testified that he believed he had presented a persuasive defense to the charges against petitioner arising out of the January 17 episode, resting on the lack of evidence that petitioner was in Brooklyn that day, defense evidence that someone else was using his car, and Spatola's testimony that he had received the heroin from another person (the "Little Baron"); Evseroff explained that he had not wished to undercut or confuse that defense—and particularly Spatola's testimony—by introducing the alternative possibility that Mazzara was the source of the heroin (*id.* at 7-8). Evseroff also stated that he had not brought his representation of Mazzara to the attention of the trial judge during petitioner's trial because he did not perceive any conflict of interest in the multiple representa-

tion (*id.* at 6). Finally, Evseroff explained that another attorney had drafted the affidavit upon which petitioner relied, and that Evseroff had declined to sign an earlier version of the affidavit because it stated that Mazzara was the source of the heroin (*id.* at 6-7).

b. After considering the foregoing evidence, the district court denied petitioner's motion for relief under Section 2255 (Pet. Supp. App. 46-62i). The court accepted Evseroff's explanation that he decided not to raise the possibility that Mazzara was the source of the heroin in order to avoid undercutting petitioner's best defense at trial (*id.* at 62a-62b), which featured Spatola's testimony that the heroin had been furnished by someone else (*id.* at 62d). The court found it significant in this regard that Evseroff's trial strategy had succeeded in obtaining an acquittal for petitioner on the most serious charge in the indictment, which alleged that he engaged in a continuing criminal enterprise (*id.* at 62e). The court also noted that raising a "Mazzara defense" might have caused the government to come forward with rebuttal evidence that petitioner and Mazzara were both involved in the January 17 heroin delivery (*id.* at 62b-62c, 62f), especially since the evidence showed that the Gambino group had to look to another source for the heroin that was the subject of that delivery (*id.* at 62g-62h).

The district court attached "little weight" to the "brief, oversimplified" statements in the affidavit signed by Evseroff (Pet. Supp. App. 58), because Evseroff had not drafted the affidavit himself, because circumstances indicated that Evseroff might have been pressured to sign it "in order to overturn the conviction of the man proved at trial to be at the apex of the conspiracy and distribution of heroin by the Gambino family in New Jersey" (*id.* at 59), and because Evseroff's testimony at the hearing, where the court had an opportunity to observe his demeanor, was

credible and established that he had exercised his best professional judgment in not pursuing the Mazzara defense (*id.* at 58-59, 60, 62c). In particular, the court credited petitioner's explanation of the comment in the affidavit that he had not sought to implicate Mazzara because of "loyalty" to him; the court was satisfied that Evseroff simply meant that it would have been unfair to Mazzara to cast him as the source of the heroin on such "flimsy evidence" as that furnished by the surveillance log showing that he was present at the Caffe Milano eight hours before the scheduled heroin delivery (*id.* at 62a-62b). For these reasons, the district court concluded that Evseroff did not have an actual conflict of interest at trial (*id.* at 62g).

5. A divided panel of the court of appeals affirmed, with each judge writing separately (Pet. App. 1-45). In an opinion announcing the judgment of the court (*id.* at 2-19), Judge Greenberg, after extensively reviewing the record of the Section 2255 proceedings (*id.* at 4-10) and accepting the district court's factual findings (*id.* at 10-12, 15-17 & nn. 3, 5), concluded that Evseroff did not labor under an actual conflict of interest. First, Judge Greenberg noted that Mazzara would not have been prejudiced by the outcome of petitioner's case, so Evseroff had no reason to sacrifice petitioner's interests to benefit Mazzara. Second, Judge Greenberg observed that the record indicated that Evseroff failed to raise the "Mazzara defense" because he believed it was "specious" and might undermine petitioner's overall defense; his failure to raise that defense was not due to his representation of Mazzara in the *Badalamenti* case (Pet. App. 15-18). Judge Greenberg further stated that even if the multiple representation created an actual conflict of interest, it did not adversely affect Evseroff's performance because it was "evident from Evseroff's reasoning as to why he did not raise the

Mazzara defense, that he would not have advanced it even if Mazzara had never been his client" (*id.* at 18).

Judge Sloviter agreed that petitioner was not entitled to relief, but she reached that conclusion on different grounds. She reasoned that the court of appeals' decision on petitioner's direct appeal established that petitioner had not then produced sufficient evidence to meet the standard of *Zepp,* which allows the court to consider conflict-of-interest claims on direct appeal when a defendant has shown the existence of an actual conflict (Pet. App. 19-23). Because, in Judge Sloviter's view, petitioner had adduced no new evidence in support of his Section 2255 motion, she regarded the court's prior decision that petitioner had not shown an actual conflict of interest to be dispositive of the same issue in the Section 2255 proceedings (*id.* at 21). Furthermore, Judge Sloviter concluded that the court of appeals was bound by the district court's findings and credibility determinations that Evseroff had valid, tactical reasons for pursuing the course he did (*id.* at 22-23).

Judge Mansmann dissented (Pet. App. 24-45). She rejected Judge Sloviter's position that the court's prior decision disposed of the conflict-of-interest issue on the current appeal, because, in her view, the prior appeal simply addressed the procedural issue whether the record was adequate to address petitioner's claim (*id.* at 24-25). On the merits, Judge Mansmann agreed with the majority with respect to the legal standard to be applied (*id.* at 24 & n.2), but she disagreed with the application of that test to the facts of this case. In particular, Judge Mansmann found it "astonishing" that a defense attorney would not raise the fact that Mazzara, apparently a known heroin dealer, was in the vicinity on the day the heroin was delivered (*id.* at 26). In addition, she observed that "it is a familiar trial tactic to argue in the alternative," and that

Evseroff therefore could have presented both the Mazzara defense and other exculpatory testimony that someone else was the source of the heroin (*id.* at 28-29).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of another court of appeals. Petitioner does not challenge the legal standard, drawn directly from *Cuyler* v. *Sullivan,* 446 U.S. 335 (1980), under which all three members of the panel below reviewed his conflict-of-interest claim. Petitioner objects only to the application of that legal test to the particular circumstances of this case. That fact-bound issue does not warrant review by this Court.

1. Petitioner's principal contention is that his attorney's simultaneous representation of Gaetano Mazzara in the *Badalamenti* case and petitioner in the New Jersey case gave rise to a conflict of interest that requires his conviction to be vacated. He argues (Pet. 22-29, 37-40) that a reasonable defense counsel not faced with a conflict of interest would have pursued a defense based on Mazzara's presence at the Caffe Milano on the day the heroin was delivered.

The legal principles governing petitioner's claim are well established and are not challenged by petitioner here. In cases of multiple representation, a defendant challenging his conviction on conflict-of-interest grounds must show that his attorney " 'actively represented conflicting interests' and that 'an actual conflict of interest adversely affected his lawyer's performance.' " *Burger* v. *Kemp,* 107 S. Ct. 3114, 3120 (1987), quoting *Strickland* v. *Washington,* 466 U.S. 668, 692 (1984); see also *Cuyler* v. *Sullivan,* 446 U.S. 335, 348, 350 (1980). Moreover, the courts generally presume that counsel "is fully conscious of the overarching

duty of complete loyalty to his or her client," and they "appropriately and 'necessarily rely in large measure upon the good faith and good judgment of defense counsel.' " *Burger* v. *Kemp*, 107 S. Ct. at 3120, quoting *Cuyler* v. *Sullivan*, 446 U.S. at 347. In addition, where, as here, the attorney's clients are tried in separate proceedings, the potential for a divergence of their interests is " 'significantly reduced.' " *Ibid.* Finally, although a conflict of interest can be shown by counsel's failure to take action (see *Holloway* v. *Arkansas*, 435 U.S. 475, 489-490 (1978)), no conflict arises from an attorney's failure to pursue a defense if the decision to forgo the defense was plausible and not taken because of the attorney's other loyalties. *Burger* v. *Kemp*, 107 S. Ct. at 3120; see also *United States* v. *Fahey*, 769 F.2d 829, 836 (1st Cir. 1985); *Oliver* v. *Wainwright*, 782 F.2d 1521, 1524-1525 (11th Cir.), cert. denied, 479 U.S. 914 (1986).

The district court and all three members of the court of appeals panel specifically recited and applied the *Cuyler* v. *Sullivan* standard, which this Court reiterated in *Burger* v. *Kemp* and which required petitioner to show that his lawyer had an actual conflict of interest that adversely affected his performance. See Pet. Supp. App. 57, 62f (district court); Pet. App. 13 (Greenberg, J.); *id.* at 20 (Sloviter, J., concurring); *id.* at 24 & n.2 (Mansmann, J., dissenting). Petitioner satisfied neither prong of that test.

a. As Judge Greenberg and the district court found, petitioner's counsel reasonably decided that pursuing the Mazzara defense would have undermined the stronger defense actually presented, which involved establishing that another individual had supplied the heroin. The facts presented at trial and at the hearing on petitioner's Section 2255 motion fully support this conclusion. That evidence showed that Mazzara was observed at the Caffe Milano in the middle of the afternoon, while electronic surveillance

established that the heroin was going to be delivered at 11:00 to 11:30 in the evening, and a car associated with petitioner was seen at the restaurant at about that time. Thus, the government's evidence strongly suggested that Mazzara was *not* the immediate source of the heroin, and Evseroff reasonably determined that he must put on a defense that responded to the government's proof that the heroin was delivered at the Caffe Milano between 11:00 and 11:30 on January 17.

The necessary defense was supplied in part by Spatola's testimony at trial that he had received the heroin from another person. Evseroff provided support for that testimony by presenting evidence that petitioner was not driving his car that evening and by eliciting testimony that none of the 13 agents watching the Caffe Milano actually saw petitioner at that location on the afternoon or evening of January 17. Pet. App. 7-8. Under these circumstances, competent counsel could reasonably conclude that an attempt to show that Mazzara was the source of the heroin might confuse the jury, fail to respond adequately to the government's proof, and cast doubt on his primary defense. In fact, given the evidence that the defendants were unable to obtain the heroin from their usual source, the Mazzara defense could have led the jury to conclude that Mazzara furnished the needed heroin to petitioner and that *both* were involved in the transaction. Under this view of the evidence, it hardly would have helped petitioner's case, as petitioner now insists, for Evseroff to have called the jury's attention to evidence placing a major drug dealer at the location where the delivery occurred and where petitioner's car was seen on two occasions on the day of the delivery.

Thus, contrary to the view of Judge Mansmann in her dissenting opinion below, it would not have been a sound defense tactic for Evseroff to present an alternative de-

fense that the jury should find the heroin to have been supplied by Mazzara if it found that the heroin was not supplied by the person identified by Spatola. As the district court found, Evseroff did not have a conflict of interest, because "[i]t was completely consistent with Evseroff's representation of both clients that he not launch blindly a 'Mazzara defense' in the Gambino litigation. The interests of [petitioner] were best served by this decision and the defense developed for him was a good one, had the witnesses supporting it been believed" (Pet. Supp. App. 62f-62g; see also Pet. App. 12 (Greenberg, J.)).

b. Even if Evseroff did labor under an actual conflict of interest, the record and findings below establish that his defense of Evseroff was not adversely affected. Evseroff's reasons for not putting on the Mazzara defense, which were credited by the district court and the majority of the court of appeals, establish that the Mazzara defense was not raised "because * * * it would have been foolish to do so" and that Evseroff "would not have advanced [the defense] even if Mazzara had never been his client" (Pet. App. 17, 18 (Greenberg, J.)).[3]

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[3] Petitioner repeatedly faults Evseroff for not conducting an "investigation" into the Mazzara defense. See Pet. 13, 22, 24, 38, 39. However, even with the benefit of a new lawyer and an opportunity for a hearing in these proceedings under Section 2255, petitioner has not identified any additional evidence—beyond the surveillance logs placing Mazzara at the Caffe Milano eight hours before the delivery took place and the statement in the *Badalamenti* filing that Mazzara was a suspected source—that would affirmatively support an argument that Mazzara in fact was the source of the heroin. More important, petitioner points to no evidence that suggests that Mazzara was the source of the heroin to the exclusion of petitioner. A lawyer cannot be faulted for not conducting an investigation when the facts known to him, including those furnished by the defendant, do not reasonably suggest that such a course would be fruitful. See *Strickland* v. *Washington*, 466 U.S. at 690-691.

c. This Court stressed in *Burger* v. *Kemp* that in the context of a conflict-of-interest charge, when the lower courts have found that the lawyer has performed his solemn duties, respect for the bar and the deference due the shared conclusion of two reviewing courts prevent this Court from substituting its speculation for the considered opinions of the lower courts. 107 S. Ct. at 3121. This is so, the Court explained, because "[t]he District Judge, who presumably is familiar with the legal talents and character of the lawyers who practice at the local bar and who saw and heard the witnesses testify, is in a far better position * * * to evaluate a charge of this kind, and the regional Courts of Appeals are in a far better position * * * to conduct appellate review of these heavily fact-based rulings." *Ibid.* Those considerations are equally applicable here, and indeed petitioner concedes (Pet. 37) that the disposition of this case turned on the "heavily fact based finding below," including "findings of credibility."[4]

2. Petitioner objects (Pet. 16-17, 29-30) to certain actions of the government after trial that he believes might have affected Evseroff's testimony. Petitioner relies on the fact that the government referred the conflict-of-interest allegation to the disciplinary committee of the New York

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[4] Petitioner seeks to impeach the district court's findings on the ground that the Section 2255 proceedings were conducted by Judge Bissell, who did not preside at petitioner's trial. See Pet. 31-32. However, petitioner ignores the fact that Judge Lacey, who did preside at petitioner's trial, made similar findings when he denied petitioner's motion for a new trial based on essentially the same evidence. Judge Lacey concluded that the assertedly "new" evidence of Mazzara's presence at the Caffe Milano would not have affected the verdict, in part because it would have supported the inference that both Mazzara and petitioner were involved in supplying the heroin. See page 5, *supra*. Moreover, Judge Bissell did conduct a hearing on petitioner's motion under Section 2255, and he had an opportunity in that hearing to observe the demeanor of Evseroff and to weigh all of the evidence.

bar, informed Evseroff that it would object to his appearance pro hac vice in another case in the district court because of those allegations, and subpoenaed Evseroff's income tax returns and records of his financial dealings with petitioner and Mazzara. Judge Greenberg sufficiently answered this objection (Pet. App. 18-19):

> The government's actions are significant to this appeal only insofar as they impacted on Evseroff's credibility at the [Section 2255] hearing. But Judge Bissell believed Evseroff's testimony and there is no reason why he was wrong in this as it was quite logical. It must be further pointed out that in view of the content of Evseroff's affidavit it was certainly appropriate for the government to bring the matter to the grievance committee's attention and to object to his admission *pro hac vice* in New Jersey. While the subpoena for his tax returns is more questionable, the government quite plausibly points out that it was interested in showing from the returns and from Evseroff's income records that [petitioner], as a client, was financially more significant to Evseroff than Mazzara.

Judge Sloviter also accepted the district court's judgment that Evseroff's credibility was unaffected by the actions of the government to which petitioner objects and that the government had given a plausible explanation for them. See Pet. App. 23 (Sloviter, J., concurring).[5] The district court, which heard Evseroff's testimony, discounted Evseroff's prior affidavit and credited his testimony at the hearing about his reasons for declining to pur-

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[5] Even Judge Mansmann, in dissent, noted without disagreement on this point that the district court "accepted a plausible explanation the government made for its actions." Pet. App. 32-33 n.5 (Mansmann, J., dissenting)).

sue the Mazzara defense and the circumstances surrounding his signing of the affidavit. Since Evseroff's testimony on these points was entirely reasonable and the panel below accepted the district court's credibility findings on this score, the factual issues concerning the government's actions prior to the Section 2255 hearing do not warrant review by this Court. *Berenyi* v. *Immigration Director,* 385 U.S. 630, 635 (1967); *NCAA* v. *Board of Regents,* 468 U.S. 85, 98 n.15 (1984).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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